THE NEGATIVE CORPORATE SEAL RULE AND EXCEPTIONS THERETO

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[*This article is a companion piece to that titled 'The Positive Corporate Seal Rule and Exceptions Thereto and the Rule in Turquand's Case' which appeared at (1973) 9 M.U.L.R. 192. Briefly the corporate seal rule refers to the common law principle that the common seal was the sole mode of expressing corporate contractual assent; the positive corporate seal rule, the principle that where the seal appeared, the corporation's assent was proved and it was bound; the negative corporate seal rule, that without the appearance of the seal the corporation's assent could not be proved and it was not bound.*]

INTRODUCTION

The most frequently cited expression of the negative corporate seal rule is from Rolfe B.'s judgment in *Ludlow Corporation v. Charlton*:[1]

> the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else.[2]

The effect of this rule was that even where the corporate mind had regularly decided to contract, there was no contract in the absence of the common seal. Not only corporate decision but also its expression in the one mode allowed by the common law, were necessary to constitute a corporate promise. The negative rule was relied upon and acknowledged in many cases.[3]

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[1] (1840) 6 M. & W. 815, hereinafter referred to as '*Ludlow*'. In order to reduce volume and repetition a practice of abbreviating the titles of frequently cited cases is adopted (though not for principal references in the text).

[2] *Ibid.* 823. The passage implies that an assent of *all* members would bind the corporation.

[3] *Cf.* the many cases which will be referred to in this article in connection with exceptions to the rule and for example, *Winne v. Bampton* (1747) 3 Atk. 473; *R. v. Inhabitants of Chipping-Norton* (1804) 5 East. 239.

EXCEPTIONS TO THE NEGATIVE CORPORATE SEAL RULE AND THE LACK OF JUDICIAL CONCERN WITH THE FORMULATION OF CORPORATE CONTRACTUAL ASSENT

The negative rule could be a harsh rule where, for example, the corporate assent was expressed to the outsider informally and he, assuming that a contract existed, performed his supposed obligations thereunder. For this reason and others, exceptions were allowed to the negative rule both by statute[4] and at common law. In allowing exceptions, the courts might, since the negative corporate seal rule had come to be regarded as a necessary consequence of the *persona ficta*, be seen to be 'piercing the veil of incorporation'.

Certainly in cases falling within the exceptions, the way was open to regard the human substratum, the 'persons who were incorporated', and to develop principles for the definition of corporate assent. Indeed one might have thought this inevitable. But it did not happen. Rather, the judgments seem to have readily assumed that once the informality of the contract was got around, the body corporate must be bound. The chief contribution of this article on the issue of the sources of the law governing the contracts of registered companies may therefore be shortly and immediately stated: a close examination of the cases falling within the common law exceptions to the negative corporate seal rule will be found to reveal no body of theory to assist in the definition of what human acts and circumstances will constitute a formulation, as distinct from an *expression,* of corporate contractual assent.

Admittedly in some cases further inquiry into the formulation of assent itself would have shown that this had occurred regularly because the body corporate's constitutional contracting organ had itself duly assented,[5] or

[4] *Cf. Scott v. Clifton School Board* (1884) 14 Q.B.D. 500. An alternative mode of corporate expression was usually provided in the special Acts of statutory companies; *e.g.* 6 & 7 Will IV, c. 123 establishing The London & Blackwell Ry Co. (signatures of three directors); and finally of course, s. 97 of the Companies Clauses (Consolidation) Act 1845 (8 & 9 Vict., c. 16 — ('the Clauses Act')) subjected the contracts of such companies to little more formal requirement than what applied to those of individuals.

[5] In *Clarke v. Cuckfield Union* (1852) 21 L.J. (N.S.) Q.B. 349 for example, Wightman J. found that the water closets in question were erected by the plaintiff 'by the direction and with the approbation of the defendants at a meeting of the board, which it was not disputed was regularly constituted' (*ibid.* 350). Other illustrative cases are *Dean & Chapter of Rochester v. Pierce* (1808) 1 Camp. 466 (*'Rochester'*) (the contracting organ here being simply the corporation's 'head', the dean); *De Grave v. Monmouth Corporation* (1830) 4 Car. & P. 111 (*'De Grave'*) (examination of goods bought 'in the jury-room at a full meeting of the corporation', though not recorded in minutes, treated as a regular corporate act like the actions of the directors in *Hely-Hutchinson v. Brayhead Ltd* [1967] 3 W.L.R. 1408); *Gibson v. East India Co.* (1839) 5 Bing. (N.C.) 262 (*'Gibson'*); *R. v. Prest* (1850) 16 Q.B. 32; *Henderson v. Australian Royal Mail Steam Navigation Co.* (*'Henderson'*) (1855) 5 El. & Bl. 409; *Haigh v. North Bierley Union* (1858) E.B. & E. 873 (*'Haigh'*); *obiter dicta* of Rolfe B. in *Ludlow* (1940) 6 M. & W. 815, 820 noted n. 22 *post; Bateman v. Ashton-under Lyme Corporation* (1858) 3 H. & N. 323; *Trainor v. M.C. of Kilmore*

had duly delegated to another person[6] authority to assent. In *Marshall v. Queenborough Corporation*[7] the court could say *obiter* that *if* the outsider had been able to prove 'a regular corporate resolution' *and* that he had acted on it to his detriment and to the corporation's benefit, specific performance would have been granted. Further, in cases where a corporation succeeded in an action against another for use and occupation it was not necessary to prove corporate assent to the use and occupation.[8] But in many cases where it was necessary to prove a corporate assent it seems to have been taken for granted or readily inferred that 'the corporation' or 'the directors' had acted, the only issue being as to the absence of the seal.[9]

At least one can assert that there was no close judicial consideration of the question, 'what constitutes a corporate contractual act in the absence of constitutional regularity?' The cases are replete with facile statements that 'the corporation' acquiesced, 'the directors' assented *etc.* It might be said that in particular cases the Court could not have done otherwise than find corporate assent; *e.g.* because the only inference open was that *all* the members of the corporation's constitutional contracting organ had 'assented', 'known', 'acquiesced' *etc.* Doubtless this is so (though whether all assenting

(1862) 1 W. & W. 293 (Eq.) (at least the original resolution to purchase was taken to be regular); *Steeven's Hospital, Dublin v. Dyas* (1863) 15 I Ch.R. 405; *Nicholson v. Bradfield Union* (1866) L.R. 1 Q.B. 620 ('*Nicholson*'); *South of Ireland Colliery Co. v. Waddle* (1868) L.R. 3 C.P. 463; *Crook v. Seaford Corporation* (1871) 6 Ch. App. 551 ('*Crook*'); *Maxwell v. Dulwich College* (1873) 4 L.J. Ch. 138; *Kidderminster Corporation v. Hardwick* (1873) L.R. 9 Ex. 13; *Connolly v. Shire of Beechworth* (1876) 2 V.L.R. 1 (E.); *Attorney-General v. Gaskill* (1880) 22 Ch.D. 537; *Bournemouth Commissioners v. Watts* (1884) 14 Q.B.D. 87 (the undisputed regularity of the Commissioners' notice to the defendant betokened their acceptance of the benefit of the paving work done for them); *Lawford v. Billericay R.D.C.* [1903] 1 K.B. 772 (C.A.) ('*Lawford*').

[6] As to the borough treasurer in *Wells v. Kingston-upon-Hull Corporation* (1875) L.R. 10 C.P. 402 ('*Wells*'), or to the urban authority's committee in *Eaton v. Basker* (1881) 7 Q.B.D. 529 (C.A.).

[7] (1823) 1 Sim & St. 520 ('*Marshall*') approved in *Wilmot v. Coventry Corporation* (1835) 1 Y. & C. Ex. 518 ('*Wilmot*').

[8] *Cf. Southwark Bridge Co. v. Sills* (1826) 2 Car. & P. 371; *Stafford Corporation v. Till* (1827) 4 Bing. 75; *Carmarthen Corporation v. Lewis* (1834) 6 Car. & P. 608.

[9] *Cf. City of London Gas-Light & Coke Co. v. Nicholls* (1826) 2 Car. & P. 365 ('*City of London Gas*'); *Smith v. Birmingham etc Gas Co.* (1834) 1 Ad. & E. 526; *Beverley v. Lincoln Gas Light & Coke Co.* (1837) 6 Ad. & E. 829; *Church v. Imperial Gas Light & Coke Co.* (1838) 6 Ad. & E. 846 ('*Church*'); *Fishmongers' Co. v. Robertson* (1843) 5 M. & G. 131; *Sanders v. St. Neot's Union* (1846) 8 Q.B. 810 ('*Sanders*'); *Lowe v. London & N.W. Ry Co.* (1852) 18 Q.B. 632 ('*Lowe*'); *Pauling v. London & N.W. Ry Co.* (1853) 8 Exch. 867 ('*Pauling*'); *Australian Royal Mail Steam Navigation Co. v. Marzetti* (1855) 11 Ex. 228 ('*Marzetti*'); *Reuter v. The Electric Telegraph Co.* (1856) El. & Bl. 341 ('*Reuter*'); *Laird v. Birkenhead Ry Co.* (1860) Johns 500 ('*Laird*') (admittedly 'the directors' must have seen the plaintiff's work which was public and visible); *South of Ireland Colliery Co. v. Waddle* (1868) L.R. 3 C.P. 463, 469 (quoted at p. 427 *post*); *Bourke v. Alexandra Hotel Co.* (1877) 25 W.R. 393, 782 (C.A.); *M.C. of Sydney v. M'Beath* (1881) 2 L.R. (N.S.W.) 142 (L.); *Hoare & Co. Ltd v. Lewisham Corporation* (1902) 87 L.T.R. 464 (C.A.) ('*Hoare & Co.*'); *Bourne & Hollingsworth v. St Marylebone Corporation* (1908) 24 T.L.R. 322 ('*Bourne & Hollingsworth*'). In some of the foregoing cases the corporation admitted the contract on the pleadings; *cf. obiter* of Tindal C.J. in *Fishmongers' Co. v. Robertson* (1843) 5 M. & G. 131; *M.C. of Sydney v. M'Beath* (1881) 2 L.R. (N.S.W.) 142 (L.).

individually was equivalent to all assenting jointly should not have been taken for granted[10]). But the striking fact for present purposes is that in these cases within exceptions to the negative rule, there is a total lack of judicial theorizing (*e.g.* in organic or agency[11] terms) as to what constitutes corporate assent, knowledge or acquiescence. The courts seem to have focused all their attention on the question of external form and once the circumstances were found to fall within an exception to the negative rule, to have overlooked or made facile assumptions as to questions surrounding the internal 'substance'. In one case where there was a statutory duty on a municipal corporation to demolish a building causing imminent danger and individuals demolished it in the name of the corporation, it could even be said that '[b]y the necessity of the thing, the doing of the work is the act of the corporation itself'.[12]

This 'lenient' judicial approach was no doubt facilitated by the *raisons d'etre* of the exceptions which were allowed. Although no single rationale explains them all and their multiplication led to confusion in the principles to be applied,[13] yet of course they each involved some claim to recognition, some 'equity'[14] which could be allowed to prevail over the requirement of form.

[10] Against this proposition are *Re George Newman Ltd* [1895] 1 Ch. 674 (C.A.) and *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 (C.A.). Some support for it will be found in *Ho Tung v. Man on Insurance Co.* [1902] A.C. 232 (P.C.); *Phosphate of Lime Co. v. Green* (1871) 25 L.T.R. (N.S.) 636; *Parker & Cooper Ltd v. Reading* [1926] Ch. 975; *Re Duomatic Ltd* [1969] 2 Ch. 365; *Freeman and Lockyer*; *Hely-Hutchinson v. Brayhead Ltd* [1968] 2 Q.B. 549 (Roskill J.). And *cf.* 'Informal Ratification of corporate acts' (1959) 228 *Law Times* 216.

[11] *Bourne & Hollingsworth* (1908) 24 T.L.R. 322 probably comes closest to a reference to agency principles. A parol contract was made by a municipal corporation's 'resident manager' and 'consulting engineer' and the jury found (but the report does not say on what evidence) that they had both actual and apparent authority to make it. On the appeal Ridley J. says only that the finding of actual authority was the more open to question and that since apparent authority was found, the question of actual authority was irrelevant!

[12] *Per* Denman J. in *Cheetham v. Manchester Corporation* (1875) L.R. 10 C.P. 249, 270. *Mayor of Thetford's* case (1702) 1 Salk. 192 may be explained in similar terms. *Mandamus* went to the corporation office and the return made by the mayor was held to be that of the corporation. Where a communication is sent to the premises occupied by a corporation and individuals then in the name of the corporation perform acts called for by the communication, this seems to be treated as some evidence that the corporation has acted (*cf. Hoare & Co.* (1902) 87 L.T.R. 464).

[13] Chancellor Blake in the Canadian Court of Error and Appeal could even wonder whether the original rule has existed:
'Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed. The old notion certainly was, that a corporation being a body politic, and invisible, could neither act nor speak, except by its common seal, or as it was expressed in argument in *R. v. Bigg* the common seal was the hand and seal of the corporation. But that dogma, never well founded in point of reason, was from the first subject to considerable qualification, and has undergone from time to time, still further limitations.'
(in *Pim v. The Municipal Council of the County of Ontario* 9 U.C.C.P. 304 cited by Patterson J. in *Bernardin v. Municipality of North Dufferin* (1891) 19 S.C.R. 581, 637-8.).

[14] *Per* Alderson B. in *Wilmot* (1835) 1 Y. & C. Ex. 518, 524-5. A distinction was sometimes drawn between the approaches of law and equity to the negative rule and

Exceptions were allowed pragmatically and justified on a rather *ad hoc* basis. The resultant confusion is best frankly acknowledged. It has often been acknowledged by the courts both in England and Australia.[15] The exceptions were forced on the courts by the broad needs of justice. They were strictly inconsistent with the old rule. Any which might be thought to be consistent with it (*e.g.* the corporation's acceptance of the benefit of the other party's performance) are more properly viewed as cases of quasi-contract or ratification rather than as instances of contractual obligation *ab initio*. They do not strictly necessitate an *expression* of the corporate will creating an obligation *in futuro* though even they require an act of the corporate will.

As already observed, in developing the exceptions shortly to be noted, the courts applied no single principle in substitution for the corporate seal rule. The most that can be said is that they examined the type of contract in question or the 'equities' of the parties and asked whether it was 'necessary' to relax the negative rule. Much of the present article is therefore not concerned with the two issues which are crucial in corporate contracts, *viz* the formulation of corporate contractual assent and its expression. Rather it is merely concerned to define the situations in which the only common law mode of expressing that assent was not insisted upon. Yet the nineteenth century concern with this question of relief from formalism which will be evident from the large number of cases dealt with in this article was an important part of the historical development of the law governing the contracts of registered companies. Moreover, as the courts justified their allowances of exceptions to the old rule, those justifications themselves became considered as theoretical bases for corporate contractual liability in their own right.[16]

The present article follows the courts' practice of examining and classifying the exceptions.

relief would be given in equity where it was not available at law (*cf. Marshall* (1823) 1 Sim & St. 520; *Edwards v. Grand Junction Ry* (1836) S.C. 1 Myl. & Cr. 650). But this should not obviate the need to show corporate assent.

[15] *E.g.* 'I greatly regret the present state of the law upon a subject so important. It would, perhaps, have been better, and have avoided the uncertainty which now exists, if the old rule had never been relaxed; . . . ' *per* Wightman J. in *Clarke v. Cuckfield Union* (1852) 21 L.J.Q.B. 349, 354. 'There is often considerable difficulty in a question of this kind arising from the multitude of the authorities respecting the powers of corporations to make contracts otherwise than under their corporate seal. Efforts have, from time to time, been made by the Courts to get free from the trammels of the old common law rule that a Corporation can bind itself only by its common seal. Bit by bit the courts have struggled in the furtherance of justice and to facilitate business transactions, to emancipate themselves from it.' *per* Sir J. Martin C.J. in *Sydney M.C. v. M'Beath* (1881) 2 L.R. (N.S.W.) 142, 148 (L.). A factor which obfuscated the law further was that sometimes the courts would hold that the corporate seal rule did not apply without giving a reason for so holding; *cf. Eaton v. Basker* (1881) 7 Q.B.D. 529 (C.A.); *Williams v. Barmouth U.D.C.* (1897) 77 L.T.R. 383 affirmed 79 L.T.R. 387 (C.A.).

[16] As already noted, there is a question whether some of the exceptions provide a basis of liability arising *ex contractu* or otherwise.

SECTION A: TRUE EXCEPTIONS BASED ON COMMERCIAL CONVENIENCE AMOUNTING ALMOST TO NECESSITY, OR ON ESSENTIALITY TO THE ACHIEVEMENT OF THE PURPOSE OF INCORPORATION

1 AN ACT UPON RECORD AND AUTHORITY TO LITIGATE

Representation of a corporation before the courts was early recognized as so important that its attorney's authority could not be challenged by third parties or denied by the corporation on the ground of the absence of a seal.[17] Similarly a compromise or settlement of litigation to which a corporation was a party did not need to be sealed.[18]

2 CORPORATIONS AGGREGATE WITH A HEAD

Sometimes it was said that corporations aggregate having a head could make parol contracts[19] though sometimes the statement rather takes the form that they could make parol contracts of the types to be discussed in Classes 3 to 6 *post*. There seems to be no reason why the corporation aggregate having a head should not, in the person of its head, be able to make a contract in the same way as a corporation sole; *i.e.* subject to no greater formal requirements than those forming part of the general law of contract. After all, the mind, hand and mouth of the individual constituting the 'head' were organically connected and he had his own individual seal.

3 SMALL OR INSIGNIFICANT ACTS OR CONTRACTS

After many paragraphs listing things which a corporation could not do except under seal, *Viner's Abridgment* states, '[*b*]*ut* of *petit things* there needs no writing, as *to light a candle,* make hay, or fire.'[20] The 'small' or 'insignificant' or 'trivial' or 'trifling' contract was often mentioned in the nineteenth century cases on corporate parol contracts. The common sense rationale of the exception was expressed in the description given it by Pollock C. B. when he described it as relating to 'all such small matters as it would be absurd and ridiculous for the corporation to use their common seal . . .'[21] Although it was often acknowledged that a corporation could be liable on such a contract unsealed, this occurred chiefly in judgments holding that the particular contract in question was not of that class.[22]

[17] In *Mayor of Thetford's Case* (1702) 1 Salk. 192 it was held that 'though a corporation cannot do an act *in pais* without their common seal, yet they may do an act upon record because the record raises an estoppel against them.' (*ibid. 193.*) And *cf. Faviell v. Eastern Counties Ry* (1848) 2 Exch. 344 where a corporation was held estopped from denying the authority, though unsealed, of the attorney who was appearing for it.

[18] *Attorney-General v. Gaskill* (1880) 22 Ch.D. 537; *Williams v. Barmouth U.D.C* (1897) 77 L.T.R. 383 affirmed at 77 L.T.R. 387 (C.A.).

[19] *E.g.* see the argument for the company in *Beverley* (1837) 6 Ad. & E. 829, 833-4 (acknowledged as correct on this point by Patteson J. for the Court *ibid.* 837); and Rolfe B. in *Ludlow*, (1840) 6 M. & W. 815.

[20] *Vin. Abr.* tit. 'Corporations' (K), par. 16, p. 288.

[21] *Marzetti* (1855) 11 Ex. 228, 234.

[22] *E.g. Ludlow* (1840) 6 M. & W. 815 (a promise of a set-off to a lessee in respect of his improvement of the demised premises and contruction of a roadway

4 APPOINTMENT OF INFERIOR SERVANTS

Perhaps the appointment of an inferior servant is only a particular illustration of the 'small or insignificant acts or contracts' exception already noted. *Cary v. Matthews* is the case most often cited as an early acknowledgment of this exception to the rule:

> [a] corporation aggregate may appoint a bailiff to distrain without deed or warrant as well as a cook or butler; for it neither vests nor divests any sort of interest in or out of the corporation. So held in *Cary v. Matthews* in *Cam Scacc.*[23]

The nineteenth century cases involving the appointments of corporate officers all seem to have been decided against the validity of the appointments concerned. In each case it was held that the officer in question was not an 'inferior servant.'[24]

It may be observed however (1) that these cases all involved appointments by corporations established for public or semi-public undertakings rather than for trading purposes; and (2) that the actions involved either

adjoining, was held not to be of such 'small importance' as to warrant dispensing with the need for sealing). Nor were the appointments of a solicitor (*Arnold v. Poole Corporation* (1842) 4 M. & W. 860; ('*Arnold*')); a contract for the removal and replacement of railway lines (*Diggle v. The London & Blackwell Ry Co.* (1850) 5 Ex. 442 ('*Diggle*')); a contract to sell iron rails in consideration of the furnishing of sections of iron railway (*Copper Miner's Company v. Fox* (1851) 16 Q.B. 229; ('*Copper Miners*')); the appointment of an attorney (*Shire of Colac v. Butler* (1879) 5 V.L.R. 137 (L.)); or the appointment of a paymaster's clerk (*Henry v. Municipal Council of Sydney* (1882) 3 L.R. (N.S.W.) 264); within the exception. In other cases the exception was merely mentioned *obiter* (*cf. Finlay v. Bristol & Exeter Ry Co.* (1852) 7 Ex. 409; *Hall v. Swansea Corporation* (1844) 5 Q.B. 526; ('*Hall*'); and *South of Ireland Colliery Co. v. Waddle* (1868) L.R. 3 C.P. 463). In *Eaton v. Basker* (1881) 7 Q.B.D. 529 (C.A.), Bramwell L.J. thought that even apart from the statutory provision which was there applicable, the contract for the appointment of the plaintiff-medico to attend fever patients was a 'small matter' and therefore within the present exception.

[23] See 6 *Vin Abr.* 287. For other early statements as to what a corporation might do without seal see *Comyn's Digest* tit. 'Franchises', F. 12-14; and *Bacon's Abridgment*, tit. 'Corporations' (E Vol. ii, p. 265 (ed. 1832)). But there were cases prior to *Cary v. Matthews* which had been concerned with the mode of appointment of the officers of corporations. In *Horn v. Ivy* (21 Car. 11) 1 Vent. 47 an action for trespass was brought in respect of the seizing of a ship and sails where the ship was carrying goods from the Canary Islands. The defendant pleaded the command and authority of 'the governors and society of the trade into the Canaries' incorporated under that name who had been granted exclusive right to trade in the area and a forfeiture of any goods exported thence by any other trader. The plaintiff's demurrer was upheld, it being observed that that although one might be employed as a butler without seal, yet one could not appear in an assise as a corporation's bailiff without a deed, (Pl. Com. 797; 12 H7, 27). The position of a corporate agent appointed by parol also arose for consideration in *R. v. John Bigg* (1717) 3 P. Will. 419, where the defendant was charged with having erased an endorsement on a bank bill with lemon juice and one issue was whether the bill, signed by a bank officer who had been appointed otherwise than under seal, was to be regarded as a '*bank bill*' for the purpose of the indictment. The point was not decided.

[24] This applied to a municipal corporation's retainer of its clerk as its solicitor (*Arnold* (1842) 4 M. & G. 680); a railway company's appointment of an agent to negotiate a lease of a railway line (*Cope v. Thames Haven Dock & Ry Co.* (1849) 3 Ex. 841); a municipal corporation's appointment of a person to the office of coal meter (*Smith v. Cartwright* (1851) 6 Exch. 927); an appointment by Poor Law Union guardians of a clerk to the master of their workhouse (*Austin v. Bethnal*

actions by the appointee against the corporation (*e.g.* for fees, wrongful dismissal), or by the appointee in right of his appointment against a third party, rather than actions by third parties against corporations based upon the actions of their appointees. The courts came to apply delictual principles of vicarious liability (which were more favourable to the third party) in such cases.

5 URGENT CONTRACTS

The reason for the exception of 'urgent' contracts from the negative rule was that the urgent necessity of the contract did not admit of the delay associated with sealing. But like the other two classes of exception mentioned, contracts actually held to be 'urgent' are noticeable by their absence from the decided cases.[25] But 'urgency admitting of no delay' was one of the bases on which a municipal corporation which owned and operated a graving dock was held liable under parol lettings of the dock in *Wells v. Kingston-upon-Hull Corporation*.[26] It was there argued that it would seriously impede the operation of the dock if ships had to be kept waiting some days until the corporation could meet to authorize the sealing of leases.[27]

6 FREQUENT CONTRACTS

To require that contracts of a frequently recurring nature be sealed would be impracticable. 'Frequently recurring acts' were noted as exceptions

Green Guardians (1874) L.R. 9 C.P. 91); a municipal corporation's retainer of an attorney (*Shire of Colac v. Butler* (1879) 5 V.L.R. 137 (L.)); a municipal corporation's appointment of a City Architect (*Municipal Council of Sydney v. M'Beath* (1881) 2 L.R. (N.S.W.) 142 (L.)); and a municipal corporation's appointment of a person to the office of clerk and paymaster (*Henry v. M.C. of Sydney* (1882) 3 L.R. (N.S.W.) 264).

[25] Corporate contracts for the appointment of an attorney (*Arnold* (1842) 4 M. & G. 680); for the removal and replacement of a railway line (*Diggle* (1850) 5 Ex. 442); for the appointment of a medical officer of the appointing Guardians' infirmary (*Dyte v. St Pancras Board of Guardians* (1872) 27 L.T.R. (N.S.) 342 ('*Dyte*')); and for the appointment of a solicitor to oppose the passing of a Bill by Parliament (*Phelps & Woodford v. Upton Snodsbury Highway Board* (1885) 1 Cab. & El. 524 ('*Phelps & Woodford*')) were all held not to be, *inter alia*, of such urgent necessity as to warrant being made by parol.

[26] (1875) L.R. 10 C.P. 402 ('*Wells*'). Another case where, even apart from a statutory provision which was applicable, a parol contract would have bound the corporation by reason of its urgent necessity was *Eaton v. Basker* (1881) 7 Q.B.D. 529 (C.A.) (urban sanitary authority's retainer of medical practitioner on outbreak of scarlet fever).

[27] The significance of the decision might be thought to be somewhat confused by the fact that although the corporation was not a trading corporation in the ordinary sense, yet the particular activity in question (the operation of a graving dock) could be viewed as a trading activity and the corporation could be viewed as a trading corporation for the limited purpose of these lettings and therefore subject to the less stringent rules applicable to contracts by trading companies. (See *post*). But Lord Coleridge C.J. who noted this question concluded that on the authorities the distinct rules affecting trading corporation could not apply once the corporation was generally classifiable as 'municipal', (1875) L.R. 10 C.P. 402, 409. (See n. 59 *post*). However, ultimately, in *Bourne & Hollingsworth* (1908) 24 T.L.R. 332 (a municipal corporation selling electricity), it was held that a non-trading corporation which trades could make its trading contracts, on the less formal bases allowed to trading companies.

to the general rule in *Church v. Imperial Gas Light & Coke Co.*[28] where it was considered that a statutory gas company's contracts for the supply of gas must be of so frequent and daily occurrence that to insist on sealing would be to impede the corporation in fulfilling the very purpose for which it was created.[29] Like the other classes of exception already noted, this one too was often recognized in cases where the contract in question was found to fall outside its scope.[30]

7 THE CONCEPT OF 'COMMERCIAL' OR 'PRACTICAL' NECESSITY

The question must be raised whether the three exceptions last examined are distinct and independent or whether they are illustrations of but one kind of exception. In fact the judges usually linked them in sequence when referring to them.[31] Further, it was suggested in *Henderson v. Australian Royal Mail Steam Navigation Co.*[32] that the smallness or frequency of a contract should not *per se* be a determinant of the form which it must follow.[33]

An attempt to state a single comprehensive basis of these exceptions to the rule was made by Patteson J. in *Beverley v. Lincoln Gas Light & Coke Co.*[34] He first noted that the corporate seal rule itself was an inevitable consequence of corporate personality; that 'a corporation . . . being merely a body politic, invisible, subsisting only by supposition of law, could only act or speak by its common seal';[35] that the corporate seal rule stood upon necessity, not upon policy and was applicable to small matters as well as to great, to personal as well as to real property. His Lordship went on to note that exceptions had been found necessary if the wheels of commerce were to turn and that 'these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle and justified only by necessity.'[36] It became, on this view, a question for the court in each case whether it was 'commercially' necessary that the contract in question be capable of being made by parol.[37]

Obviously, very often 'small' contracts 'frequent' contracts and probably always 'urgent' contracts would satisfy this general test.[38] But the test of

[28] (1838) 6 Ad & E. 846 (*'Church'*).

[29] *Cf. Wells* (1875) L.R. 10 C.P. 402; Wightman J. in *Hall* (1844) 5 Q.B. 526. and Matthew J. in *Stevens v. Hounslow Burial Board* (1889) 61 L.T.R. 839.

[30] As in *Ludlow* (1840) 6 M. & W. 815.

[31] *E.g.* 'cases so constantly recurring, or of so small importance, and so little admitting of delay . . .' *per* Keating J. in *Austin v. Bethnal Green Guardians* (1874) L.R. 9 C.P. 91, 95.

[32] (1855) 5 El. & Bl. 409 (*'Henderson'*).

[33] *Ibid.* 417 *per* Erle J.

[34] (1837) 6 Ad. & E. 829 (*'Beverley'*).

[35] *Ibid.* 844.

[36] *Ibid.* 845. 'Necessity' as used here meant the need for commercial practicability or feasibility as distinct from 'necessity' in the sense of 'logical inevitability' used previously.

[37] Applying the principle in *Beverley* (1837) 6 Ad. & E. 829, Patteson J. allowed an action in *assumpsit* against a gas company on its parol contract to buy gas meters manufactured by the plaintiff.

[38] In *Beverley* (1837) 6 Ad. & E. 829, Patteson J. emphasied that gas meters were 'constantly required' by a gas company and were of 'small price'. (*ibid.* 845).

commercial necessity as postulated was not to be easily satisfied. Unlike the courts of the United States of America, Patteson J. would apply a strict standard of necessity and disclaimed entirely the right or wish to encroach upon the common law rule merely upon any ground of 'inconvenience' however strongly made out.[39] Lord Denman C.J. in *Church* said that the exceptions to the seal rule were based on 'convenience amounting almost to necessity.'[40] In many of the cases where the negative rule was applied it was said that there was no convenience amounting to necessity which would justify relaxation of the rule.[41]

The 'practical necessity' basis of liability in relation to *urgency* is well illustrated in *Cheetham v. Manchester Corporation*[42] where a question arose as to whether a corporation had been liable to pay a contractor for his demolition, on the order of the town clerk, of a building which was causing imminent danger. More precisely the question (involving construction of a statute) was whether 'the corporation' had demolished 'as the corporation thought requisite'. Denman J. said;

> [t]he suggestion of the Solicitor-General that the council or a committee should first consider the matter, is utterly impracticable. I cannot conceive anything more improbable than that the legislature should have intended that the opinion of a jury should be taken in each case as to whether there was or was not imminent danger from the building.[43]

and

> The assumption is that the building is in imminent danger of falling. Prompt action is necessary. . . . By the necessity of the thing the doing of the work is the act of the corporation itself.[44]

A recurrent difficulty in reading the nineteenth century seal cases is the inherent ambiguity of the word and concept, 'necessity'. After all, that single ambient word may, in its broadest sense, describe every basis on which a corporation is held bound by a parol contract including those yet

[39] *Ibid.* 838.

[40] (1838) 6 Ad. & E. 846, 861: 'Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed . . .' Lord Denman C.J. was cited at length with approval in *Ludlow*, and Stawell C.J. of the Victorian Supreme Court described this class of exception in similar terms in *Shire of Colac v. Butler* (1879) 5 V.L.R. 137 (L.) as 'resting mainly upon the inconvenience, and almost impracticability of requiring the seal to be affixed to agreements respecting matters of frequent occurrence and of trifling importance'. (*ibid.* 139-40).

[41] *E.g.* in *Diggle* (1850) 5 Ex. 442 (contract for removal and replacement of railway line); *London Dock Co. v. Sinnott* (1857) 8 E. & B. 347 (parol contract to execute a contract under seal for scavenging of corporation's dock for one year); *Shire of Colac v. Butler* (1879) 5 V.L.R. 137 (L.) (parol retainer of solicitor); *Henry v. M.C. of Sydney* (1882) 3 L.R. (N.S.W.) 264 (appointment of person to office of clerk and paymaster of a municipal corporation); and *Stevens v. Hounslow Burial Board* (1889) 61 L.T.R. 839 (burial board's ordering of extra repairs beyond those stipulated in contract).

[42] (1875) L.R. 10 C.P. 249. In this case the corporate seal rule itself was not argued but analogous considerations apply.

[43] *Ibid.* 270.

[44] *Ibid.*

to be discussed. What was meant by the use of that term in relation to small, frequent and urgent contracts is that the 'realties of commerce' demanded that a corporation should be regarded as capable of being bound by those kinds of parol contracts because otherwise it could not function. Central to the concept of necessity in that context was the obvious impracticability of the negative rule for *any* corporation if applied with perfect logical rigour.

But as will be noted *post*, the word was also sometime used to signify that the making of certain contracts might be essential to the achievement of the purpose for which a *particular* corporation was created. As so used the term did not indicate a logical consequence that such contracts must be capable of being made by parol but the courts did acknowledge 'contracts essential to the achievement of the purpose of incorporation' as an exception to the negative rule.[45]

A third meaning which the term bore was simply that it was sometimes morally necessary that a corporation should be held liable on a basis akin to unjust enrichment.[46]

8 CONTRACTS ESSENTIAL TO THE ACHIEVEMENT OF THE PURPOSES OF INCORPORATION OF BOTH TRADING AND NON-TRADING CORPORATIONS

Some judges described the small, frequent or urgent contracts not merely as exceptions necessitated by the realities of commerce but more specifically, yet more liberally, as exceptions which were necessary to the achievement of the purposes of incorporation.[47] Indeed, in order to determine what constituted small, frequent or urgent contracts for a particular corporation one would first have to define the particular purposes of its

[45] See pp. 421 to 424 *post*.

[46] As to which see pp. 431 to 438 *post*. The ambiguity of the word is evident in *Hall* (1844) 5 Q.B. 526. That was an action in *assumpsit* by a layer keeper against a municipal corporation to recover tolls to which he was entitled but which the corporation had wrongfully taken and withheld from him. Clearly it was not *commercially* necessary nor essential to the achievement of its purpose that the corporation be able to commit such a wrong without seal. But it was necessary for the achievement of justice that the corporation be held liable to disgorge that which it had unlawfully received. The absurdity of insisting on a sealed engagement in such a case was noted by Lord Denman C.J.: 'if the corporation have helped themselves to another's money, it would be absurd to say that they must bind themselves under seal to return it . . . Their wrongful act binds them to return it, without any actual promise.' ((1844) 5 Q.B. 526, 547 and see Patteson J. to the same effect on pp. 548-9).

'Necessity' is first stated as the underlying principle of the true contractual exceptions already mentioned (commercial necessity), then used to justify a decision which is clearly based on necessity in the quasi-contractual sense of 'moral necessity'. Only Patteson J. does not become entangled with the cases concerned with 'necessity' in the sense of 'required by the demands of commercial practicability', and even he does not explain the sense in which he uses the word. The distinction between commercial necessity on the one hand and moral necessity of the *Hall* (1844) 5 Q.B. 526 type on the other was noted by Lord Campbell C.J. in *Lowe* (1852) 18 Q.B. 632.

[47] *E.g. per* Lord Denman C.J. in *Church*: 'Whenever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed . . . '((1838) 6 Ad. & E. 846, 861).

incorporation. But a contract might not be small, frequent or urgent yet might be essential to the *achievement of the purposes of incorporation.* Thus, although there was a large overlap, it seems that 'essential contracts' (as they will be described) are an exception distinct from the exception arising from the demands of commercial practicality.

The earliest illustration of the 'essential contracts' exception seems to be *Sanders v. St Neot's Union.*[48] Iron gates for a Union's workhouse were ordered by parol from the plaintiffs and were supplied and they were apparently held to be essential to the achievement of the workhouse purposes,[49] although the order for such gates was not a small, frequent or urgent contract. The leading case on 'essential contracts', *Clarke v. Cuckfield Union,*[50] was similar. A Union was held liable for waterclosets ordered by parol for the Union workhouse. They were described by Wightman J. as being 'necessarily incidental' to the purpose of incorporation of a poor law union.[51] The 'essential contracts' exception was therefore established in a case concerning a non-trading corporation and was applied in many other cases concerning non-trading corporations.[52] In certain other cases the

[48] (1846) 8 Q.B. 810 ('*Sanders*').

[49] The same class of exception had been acknowledged two months earlier in *Paine v. Strand Union* (1846) 8 Q.B. 326 but the contract in that case was held not to be within the exception.

[50] (1852) 21 L.J.Q.B. 349.

[51] Although doubts were subsequently cast on Wightman J.'s judgment *(e.g.* in *Smart v. West Ham Union* (1855) 10 Ex. 867 ('*Smart*')), it was preferred in *Nicholson* to any earlier inconsistent decision as 'founded on justice and convenience' (1866) L.R. 1 Q.B. 620, 627 and that preference was itself approved of in *Lawford* [1903] 1 K.B. 772.

Wightman J. relied upon *Sanders, Church and Beverley* but found *Lamprell v. Billericay Union Guardians* (1849) 3 Ex. 283 ('*Lamprell*') difficult to distinguish. *Lamprell* was a case in which the plaintiff, a builder, constructed the Union House at Billericay under a sealed contract and sued in respect of *additional* work authenticated *afterwards* by the certificate of *one* of the architects whereas the contract required that additional work be authenticated by a *prior* authority signed by *all* the architects. That the original sealed contract provided specifically for a mode of variation seems to be adequate ground for distinguishing *Lamprell* from *Clarke v. Cuckfield Union* (1852) 21 L.J. Q.B. 349.

[52] Examples are *Bateman v. Ashton-under-Lyme Corporation* (1858) 3 H. & N. 323 (parol retainer of plaintiff engineer to prepare plans for corporation's application to Parliament for power to extend its water works); *Haigh* (1858) E.B. & E. 873 (retainer of plaintiff to investigate defalcations by Guardians' clerk and to make up accounts for previous half-year, held to be necessary for the protection of the Union's funds); *Nicholson* (1866) L.R. 1 Q.B. 620 (parol purchase of coals for use in Union's workhouse); *Lawford* (*obiter dicta* that retainer of plaintiff architect to prepare school plans for education authority was 'necessary for the defendant corporation in carrying out the purposes for which it was created' ([1903] 1 K.B. 772, 785 (C.A. *per* Stirling L.J.)).

A case which caused difficulty in several of those cases (*e.g.* in *Haigh* and *Nicholson supra*) was *London Dock Co. v. Sinnott* (1857) 8 E. & B. 347. The dock company in that case had made a parol contract to execute a formal contract under seal for the scavenging of the docks for twelve months and was held not bound. Judges in subsequent cases sought to distinguish it on various grounds (*cf.* Erle J. in *Haigh* whose basis for distinction ('convenience amounting almost to necessity') if admitted would apparently destroy His Lordship's decision in the case before him. Gwynne J.'s attempt in the Canadian case *Bernardin v. North Dufferin Municipality* (1891) 19 S.C.R. 581 ('*Bernardin*'), to distinguish the *London Dock Co.* case is also not convincing. It is ultimately an attempt based upon the executed-executory dichotomy (see p. 438 *post*). In addition it tends to be contradicted by his own

'essential contracts' exception might well have been applied[53] and in others it was acknowledged.[54]

By 'contracts essential to the achievement of the purposes of incorporation' is meant something different from contracts which are merely

citation of *Marshall* (1823) 1 Sim & St. 520). It appears that the most satisfactory approach is to regard the parol contract itself as an 'unusal' or 'extraordinary' one in that it was not itself the actual scavenging contract but only a promise to make such a contract.

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[53] 'Essentiality to purpose' as well as 'practical necessity' could explain the statutory gas company's liability on a parol contract to supply gas in *City of London Gas* (1826) 2 Car. & P. 365. In *M.C. of Sydney v. M'Beath* (1881) 2 L.R. (N.S.W.) 142 (L.) a municipal corporation which was required by statute to build a town hall, retained by parol an architect who performed his contract and sued for his fees. It was held that the appointment of the architect required sealing but that having accepted the benefit of his performance, the council had become liable (see pp. 433 to 438 *post* as to this basis of liability). But it appears that the corporation could as well have been held liable on the narrower basis of the essentiality of the contract. Even counsel for the defendant acknowledged that the building of the town hall was in 'obedience' to an Act of Parliament.

[54] *E.g.* in *Broughton v. Manchester & Salford Water-Works Co.* (1819) 3 B. & Ald. 1; *Dunston v. Imperial Gas Co.* (1832) 3 B. & Ad. 125; *Arnold* ((1842) 4 M. & G. 860 *per* Tindal C.J.); *Paine v. Strand Union* (1846) 8 Q.B. 326 (poor law Union Guardians' retainer of plaintiff to make survey and prepare plans of a particular parish in connection with an application for an Act of Parliament); *Diggle* ((1850) 5 Ex. 442 contract for the removal and replacement of a statutory railway company's lines); *Barker v. M.C. of Clunes* (1863) 2 W. & W. 315 (L.) (*'Barker'*) (a Victorian municipal corporation's contract for the erection of a dam and construction of a reservoir); *Sutton v. The Spectacle Makers' Company* (1864) 10 L.T.R. (N.S.) 411 (London livery company's retainer of a solicitor to oppose a parliamentary Bill introduced at the instigation of other companies); *Crampton v. Varna Ry Co.* (1872) L.R. 7 Ch. App. 562 (*'Crampton'*) (contract for the erection of houses adjoining the company's railway); *Hunt v. Wimbledon Local Board* (1878) 4 C.P.D. 48 (urban authority's contract for the preparation of plans for new urban offices. Bramwell B. described 'essential' contracts as those without which the corporation could not have done its duty or carried out its purpose); *Shire of Colac v. Butler* (1879) 5 V.L.R. 137 (L.) (municipal corporation's retainer of a solicitor); *Phelps & Woodford* (1885) 1 Cab. & E1 524 (highway board's retainer of a solicitor to oppose a parliamentary Bill for an Act enabling a railway company to pass through the board's area).

A case in which a contract appears to have been absolutely essential to the achievement of the corporation's purpose but in which the corporation was held not bound was *Smart* (1855) 10 Ex. 867 Union Guardians, in accordance with an order of the Poor Law Commissioners appointed the plaintiff collector of the poor-rates; the appointment was read to the plaintiff and recorded in the corporation's minute book; and the plaintiff performed the work associated with the office. He sued the Guardians for unpaid poundage. The decision of the Court of Exchequer Chamber in favour of the corporation was based on the narrow ground that the Act's intention was not to impose liability on the Guardians. But two of the four Barons of the Exchequer expressed doubts about the principle of essentiality as enunciated by Wightman J. in the Court of Queen's Bench in *Clarke v. Cuckfield Union* (1852) 21 L.J. Q.B. 349. (It is thought that the contract in *Smart* was 'just as essential 'as the contract for the erection of a Union workhouse in that case. Parke B. acknowledged that if the decision of the Court of Queen's Bench were allowed to be correct, several of the Exchequer's own previous decisions would thereby be overruled). But the *obiter dicta* were subsequently disapproved in *Lawford* [1903] 1 K.B. 772 and the correctness of the 'essential contracts' exception confirmed. In *Ludlow* (1840) 6 M. & W. 815 the present exception was recognized, though, in terms unfortunately and unnecessarily only in relation to trading corporations. This aspect of the judgment was criticized at length by Gwynne J. (with Taschereau J. agreed) in *Bernardin* (1891) 19 S.C.R. 581. *Ludlow* illustrates the difference between the approaches of the Courts of Exchequer and the Queen's Bench to the instant question. The former for some time declined to hold the 'essential contracts' exception applicable to non-trading corporations; see *Henderson* noted at p. 425 *post.*

intra vires a corporation and something different from the contracts incidental to the trading purposes of a trading corporation shortly to be noted. What are referred to in the expression are those parol contracts which must have been within the contemplation of those responsible for the incorporation and without which the royal or parliamentary intention must be frustrated. Indeed the rationale for the 'essential contracts' exception rests upon intention.[55]

9 ORDINARY CONTRACTS IN THE ORDINARY COURSE OF BUSINESS OF TRADING CORPORATIONS

It was said in many cases[56] that trading corporations could contract less formally than non-trading corporations. Underlying this distinction were the facts that (1) trading corporations had to function, if they were to survive, in a commercial milieu which called for speedy and relatively informal contracting; (2) the members of such corporations had ventured their funds to be employed in that milieu and subject to its rules and therefore did not call for the same protection as those who contributed funds, often under compulsion, to corporations which were set up for a public or semi-public purpose; (3) the device of incorporation had originated in English law with respect to municipal and charitable corporations and was not entirely suited to trading bodies to which it had been adapted in the seventeenth and eighteenth centuries; and (4) there was a persuasive association between trading corporations and trading partnerships and the latter did not have to contract in specially formal modes.

Sometimes the distinction between the contracts of trading and non-trading corporations is stated without explanation of the reason for the application of different sets of principles.[57] Rarely was an attempt made to find a single unifying basis of liability applicable to both; *e.g.* by relating the exceptions allowed in respect of both classes of corporation to the concepts of 'practical necessity' or 'essentiality to purpose' previously discussed. It will be finally suggested here that certainly the latter test, when applied to a trading corporation, simply meant that such a corporation should be capable of being liable on parol contracts made within the ordinary course of the business which the company was formed to carry on.

[55] Although in one or two of the cases, rather less stringent language is used (*e.g.* 'contracts *incidental* to the purposes of corporation') which would be more appropriate to the contracts of trading corporations (see pp. 424 to 438 *post*) it is believed that the strict test was always intended. (In Canada a less stringent test was applied from the first. Even the non-trading corporation was bound so long as the contract in question was (1) beneficial to the corporation; and (2) incidental or ancillary to its purposes: *Campbell v. Community General Hospital etc.* (1910) 20 D.L.R. 467 (charitable corporation held liable on parol contract by its manager for drilling of well on its farm land).) Even in the United Kingdom it has now been noted (in *A.R. Wright & Son Ltd v. Romford Corporation* [1957] 1 Q.B. 431) that 'essentiality to purpose' has been replaced by 'connection with purpose'. But it is submitted that in the U.K. and Australia, this is so at common law only in respect of *executed* contracts (as to which see *post*).

[56] *E.g. Dyte* (1872) 27 L.T.R. (N.S.) 342; *Ludlow* (1840) 6 M. & W. 815; and other cases examined *post*.

[57] *E.g.* by Stawell C.J. in *Barker v. M.C. of Clunes* (1863) 2 W. & W. 315 (L.).

A distinction between the two classes of corporation was recognized in many cases. In one of the earliest, *Gibson v. East India Co.*[58] a pension was made payable to a military officer of the company in respect of his service in India, by a 'Military Letter' issued by the company. The officer had entered the company's service in reliance upon the letter. His assignees in bankruptcy sued the company for pension accrued. The Court of Common Pleas concluded that this particular company bore two characters, that of a trading company and that of a territorial governor, and that the grant of a military pension related to its political character as governor: '[i]t related to the territorial and political branch, as distinguished from the commercial branch of the company's affairs; . . .'[59] In these circumstances the negative corporate seal rule had to be applied. In 1840 (the year following the decision in *Gibson* but still four years before the first Companies Act) it was acknowledged in *Ludlow* that a new class of exception had been allowed *in respect of trading corporations* established sometimes by royal charter, more often by Act of Parliament, the nature of whose constitutions required that the Court should 'imply in those who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation's concerns, an authority to do those acts, without which the corporation could not subsist'.[60]

The question of contracts by trading corporations became prominent in the 1850's and 1960's.[61] In *Marzetti's* case[62] a chartered shipping company formed for the purpose *inter alia* of 'the carrying of the royal mails, passengers and cargo, between our United Kingdom . . . and Australia,' was held to have been bound by a parol purchase of a quantity of ale for a voyage.[63] In *Henderson's* case[64] is to be found a valuable

[58] (1839) 5 Bing. (N.C.) 262.

[59] *Ibid.* 273 *per* Tindal C.J. The peculiar position of a non-trading corporation which engages in trade also arose in *Wells* (as to which see n. 27 *ante*) and *Bourne & Hollingsworth* (a municipal corporation selling electricity). The view refuted by Lord Coleridge L.J. in *Wells* (1875) L.R. 10 C.P. 402, was adopted and followed by Ridley J. in *Bourne & Hollingsworth*, that when making trading contracts such a corporation is to be regarded as a trading corporation for the purpose of the negative rule.

[60] *Ibid.* (1840) 6 M. & W. 815, 821 *per* Rolfe B. In *Diggle* (1850) 5 Ex. 442 the drawing of bills of exchange by *trading corporations* is given by Alderson B. as an example of acts excepted from the old rule as 'such acts as the corporation is appointed to do'. But the removal and replacement of a railway line (which was the subject of the contract in that case) was held not to be such an act as the defendant railway company was appointed to do. (It is thought that such a contract might, in certain circumstances, approximate to the concept of essentiality to the achievement of the purposes of a railway company). Nor was a contract for the sale of iron rails by a company of copper miners, in consideration of a promise to furnish the company with sections of iron railway, found to be essential to copper trading (*Copper Miners* (1851) 16 Q.B. 229).

[61] Of course one must distinguish between decisions based on contract sections (whether in a company's special Act or in the joint-stock companies legislation) and those based on the exceptions to the common law rule being examined in this article.

[62] (1855) 11 Ex. 228 (*'Marzetti'*).

[63] See especially Pollock C.B.: 'it is now perfectly established by a series of authorities, that a corporation may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public

review and statement of the law by the Court of Queen's Bench. A ship's captain had been employed by parol by the same chartered shipping company for an agreed remuneration. The company sought to distinguish *Marzetti* on the ground that the contract there (for the purchase of ale) was of a frequent or urgent nature whereas the contract in the instant case was an isolated one. It can be agreed that in fact it was not small, frequent or urgent. But Wightman J., purporting to adhere to what he had said in *Clarke v. Cuckfield Union,* found that the retrieving of the ship was 'directly within the scope of the purposes for which the Company was incorporated.'[65] He distinguished those cases in which the Court of Exchequer had given decisions at variance with those of the Queen's Bench[66] as being concerned with non-trading corporations and so long as there were no other corporations, the 'practical necessity' exceptions were the only ones recognized.[67] But further relaxation of the negative rule had become necessary in favour of the growing number of trading corporations. Wightman J. re-stated this further relaxation which he had first enunciated in *Clarke v. Cuckfield Union*: 'whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal.'[68] Erle J. concurred on the ground that the contract was 'directly connected with the purpose of the incorporation' of a trading corporation.[69] In a short concurring judgment Crompton J. said that he could not distinguish the instant case from

convenience and is in accordance with common sense.' (*ibid.* 234). But all four Barons (Pollock C.B., Alderson, Platt and Martin BB.) were able to rest their decision upon the other party's 'acceptance of the benefit' of the corporation's performance. In these circumstances at least, it was not necessary to ask (and the report does not say) who made the parol contract which Pollock C.B. intimated had bound the corporation.

[64] (1855) 5 E1. & B1. 409 (*'Henderson'*).

[65] *Ibid.* 414.

[66] He mentioned specifically *Lamprell, Diggle, Ludlow* and *Arnold.*

[67] This was too narrow a statement, for the 'essential contracts' exception, as noted *ante,* was itself established and allowed in cases concerning non-trading corporations. The point is that as applied to non-trading corporations, the effect of the exception was not so wide (see *post*).

[68] *Ibid.* 415. This *dictum* is supported by Chancellor Blake in the Canadian case, *Pim v. The Municipality of the County of Ontario* (1891) 19 S.C.R. 581, 638.

[69] *Ibid.* 417. He admitted that the authorities were conflicting; doubted whether his *dictum* could apply in respect of non-trading corporations (he was given such a wider application by Patteson J. in *Bernardin*); and noted the desire of the Court of Exchequer that no corporate contract should be valid unless sealed; but approved of Wightman J.'s statement of the law in *Clarke v. Cuckfield Union* (1852) 21 L.J.Q.B. 349 (though he concluded that in so far as it laid down frequency or insignificance as a test, it should not be adhered to because those restrictive tests were originally propounded and remained relevant only with respect to municipal corporations).

In his judgment in *Bernardin* (1891) 19 S.C.R. 581 Gwynne J. quotes other passages from the judgments of Wightman J. and Erle J. in which there is no use of the word 'trading' or emphasis on the trading character of the corporation but it is clear from the passages cited above and from the nature of the defendant company that both judges took for granted the necessity that the corporation bear this character, if a parol contract were to be excepted from the old rule merely on the ground that it *related to, i.e.* was *intra vires,* the purpose of incorporation.

decisions of the Court of Exchequer (especially *Diggle's* case) but that he considered the present Court's view preferable.

By 1856, Lord Campbell was able to say in *Reuter v. The Electric Telegraph Co.*[70] that no reliance could be placed on the negative rule where, as here, the defendants (a chartered joint stock company) were 'a corporation for carrying on a particular business; and the services done by the plaintiff were in the direct course of the business.'[71]

The leading case which is usually cited as having settled the law relating to the formality of contracts by trading corporations is *South of Ireland Colliery Co. v. Waddle*[72] decided in 1868. In that case a colliery company was held bound by a parol contract for the erection of a pumping engine and machinery. Bovill C.J., in rejecting the argument that exceptions to the general rule were limited to small or frequent contracts, said this:

> originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurence, such as the hiring of servants, and the like. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of *corporations created for trading and other purposes.* At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must I think be held not to be law. *These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated.* A company can only carry on business by agents, — managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal.[73]

Not only may a company which is fundamentally non-trading in character become a trading company in respect of some of its activities but a company which is essentially a trading company may not be bound by a particular parol contract because it is not a 'trading contract'. 'Extra-

[70] (1856) 6 El. & Bl. 341 (*'Reuter'*).

[71] *Ibid.* 347. He cited *Copper Miners* (1851) 16 Q.B. 229 and *Henderson* (1855) 5 El. & Bl. 414. Admittedly an alternative basis for this decision was ratification by the company. The deed of the company (a chartered company) vested contracting power in the directors. Their chairman made a parol contract with the plaintiff and entered a note of it in the company's minute-book. The contract was recognized in correspondence between the company secretary and the plaintiff and the latter was paid money pursuant to it by company cheques. The Court inferred that since the entry in the minute-book brought the agreement to the notice of such of the directors as chose to read it, and the cheques must have been signed by directors, the only inference possible was that 'the directors' knew of and acquiesced in the contract.

[72] (1868) L.R. 3 C.P. 463. This case concerned a registered company but the judgment did not turn on the statutory provisions.

[73] Emphasis added. *Ibid.* 469. A second and more limited ground given by His Lordship for his decision was one based on the effect of the Companies Act 1862 and the company's deed of settlement.

ordinary' or non-trading contracts, even of trading corporations, must be sealed. This principle seems to explain the troublesome decision in *London Dock Co. v. Sinnott*[74] where it was held that although the dock company there was to be classified as a trading corporation, yet its parol contract to execute a formal contract for the scavenging of its docks for twelve months was not a 'mercantile contract'.[75] The same principle was treated in a number of cases.[76]

The result of the cases seems to be that the negative corporate seal rule does not apply to contracts in the ordinary course of business of trading corporations or to contracts in the ordinary course of the trading part of the activities of non-trading corporations. The courts did not pass on to deal with the question how such contracts were to be expressed.[77]

The equivocation in the word 'necessary' as applied alternatively to trading and to non-trading corporations is illustrated by the judgment of Lindley J. at first instance in *Hunt v. Wimbledon Local Board.*[78] He said of an 'urban authority':

> [n]ow, in the first place, it is to be observed that the dependants are not a trading or commercial corporation having gain for its object: they are created for the purposes mentioned in the Public Health Acts, and they are in

[74] (1857) 8 E. & B. 347.

[75] It was pointed out that the contract was not made with a customer of the company. It is difficult however to restrict 'mercantile contracts' to those made with customers of a company. Possibly the scavenging contract itself would have been a 'mercantile contract'. The better way of explaining the decision is that a contract to make such a contract was itself an 'extraordinary' contract rather than an 'ordinary trading contract'.

[76] In *Re Contract Corporation; Ebbw Vale Co.'s Claim* (1869) L.R. 8 Eq. 14 Lord Romilly implies that the negative rule may have had some relevance if the contract had lain outside the ordinary course of business of the trading company in question. In a Canadian case, *Sun Electrical Co. v. McClung* (1913) 12 D.L.R. 758, an electrical engineering and contracting company which had contracted by parol to release premises which it had leased was held not bound thereby because the contract was not 'germane to the purpose of its creation'. But in a second Canadian case, *J.H. McKnight Construction Co. v. J.A. Vansickler* (1915) 31 O.L.R. 531; 51 Can. S.C.R. 374 affirmed 24 D.L.R. 299, where a trading company had contracted by parol to sell its premises, it was held bound because its purpose in so contracting was to obtain funds with which to buy other premises in which to carry on business! The Canadian Supreme Court felt free in these circumstances to hold that the contract for sale was itself in furtherance of the objects of the company. (It is frankly doubtful whether this approach is justifiable. A contract of the type in the *McKnight Construction* case is scarcely within the original English concept of a 'trading contract' and the very English cases cited by the Canadian Supreme Court (*South of Ireland* (1868) L.R. 3 C.P. 463 and *Henderson* (1855) 5 E1. & B1. 409) illustrate the difference). In the area of tort too a corporation's responsibility for the acts of officers performed in the ordinary course of business is distinguished from its non-responsibility for their 'extraordinary acts'. Thus although in *Smith v. Birmingham & Staffordshire Gas Light Co.* (1834) 1 Ad. & E1. 526, a gas company was held liable for an agent's wrongful distress, *Horn v. Ivy* (1669) 1 Vent. 47, was distinguished as having been concerned with an extraordinary act.

[77] It is noteworthy that the contracts in question are those which an individual partner in a common law partnership, and ultimately 'the directors' of an unincorporated joint stock company, were held to have ostensible authority to make. *Cf. Hawken v. Bourne* (1841) 8 M. & W. 703; *Hallett v. Dowdall* (1852) 18 Q.B. 2; *Maclae v. Sutherland* (1854) 3 E1. & B1. 1; *Forbes v. Marshall* (1855) 11 Ex. 166.

[78] (1878) 3 C.P.D. 208.

> fact the representatives of and trustees for the inhabitants of Wimbledon for such purposes. I cannot therefore regard as applicable to this case those numerous decisions which shew that incorporated companies having gain for their object are liable in respect of contracts not under seal, provided they are necessary for and incidental to the purposes for which they are created. Such cases, for example, as *South of Ireland Colliery Co. v. Waddle* and *Reuter v. The Electric Telegraph Co.* do not, in my opinion, govern this case.[79]

The simple fact is that what is 'necessary' to the achievement of the purpose of a trading corporation calls for a much wider latitude of discretion in its governing body than that required for a non-trading corporation for no other reason than that the purpose of the former is trading.[80] This is the idea expressed succinctly by Denman J. in *Wells v. Kingston-upon-Hull Corporation*:[81]

> the principle of necessity which applies to all corporations alike, only authorizes trading corporations to do certain acts without using their seal, because such acts are necessary for the very purpose of their existence, which is not the case with other corporations.[82]

As noted at the beginning of this section, the nature of trading companies involves adventure, risk and discretion which would be improper if engaged in by poor law guardians, charitable, ecclesiastical or municipal corporations. What is essential to the achievement of the purpose of a trading company is impossible to prescribe *in futuro* except by saying that it must be free to trade at the discretion of its officers. One could express the same idea by saying that 'essential for the achievement of the purposes of incorporation' is a fixed phrase with variable content, and the content is so much wider in the case of trading corporations that judges have often been disposed when speaking of them to substitute for the words 'essential to' such expressions as 'incidental to', 'ancillary to' or 'within'. Unfortunately the language of the judges is by no means consistent and there are cases where the looser expressions are used even in relation to non-trading corporations[83] but it is believed that there is no authority for the proposition that a non-trading corporation is at common law liable on an executory parol contract on the basis that the contract is merely 'related' to, *i.e. intra vires* the purposes of incorporation.[84]

[79] *Ibid.* 213-4.

[80] This may be indicated by His Lordship's addition of the words 'or incidental' when he speaks of trading companies.

[81] (1875) L.R. 10 C.P. 402 ('*Wells*').

[82] *Ibid.* 411-2. The 'principle of necessity which applies to all corporations alike' is the principle referred to in his thesis as that of 'essentiality'.

[83] *E.g.* the *obiter dictum* of Matthew J. in *Scott v. Clifton School Board* (1884) 14 Q.B.D. 500, 503.

[84] A different approach has been taken in Canada; *cf.* the thoroughgoing analyses of the English decisions in *Bernardin* and in *Campbell v. Community General Hospital etc.* (1910) 20 O.L.R. 467. In the most recent authoritative English case on the negative corporate seal rule and its exceptions *A.R. Wright & Son v. Romford B.C.* [1957] 1 Q.B. 431 (C.A.) the plaintiffs sued on an executory parol contract under which they were to demolish certain buildings owned by the defendant municipal corporation. Lord Goddard C.J. did not deliver a very explicit judgment

A RECAPITULATION

The exceptions examined depend not upon legislation but on the common law. They exist in respect of all bodies corporate, however formed. They do not depend upon the other contracting party's performance or give rise to a quasi-contractual liability but involve a truly contractual liability. But nowhere do the courts say who may effectively make a small, frequent, urgent, 'necessary', essential or trading contract on behalf of the corporation. Clearly the constitutional contracting organ could do so. But must that organ behave with total regularity when contracting by parol? And could a servant or officer at a lower level in the corporation's hierarchy contract for it and if so on what ground?

There is no mention of corporate-constitutional law principles or of agency principles in the cases. There might well have been some mention of the latter in the cases involving trading corporations since (1) these could be likened to trading partnerships, and (2) there was an increasing number of them and this fact would provide an indication of what authority was usually attached to certain offices. On the other hand even the statutory trading companies had a semi-public purpose and were somewhat different from the private trading partnership in substance as well as in form.

At all events certain conclusions seem clear:

(1) Where an exception to the old rule was allowed the courts seem to have held the corporation liable without a close inquiry and certainly without theorizing as to the status of the human instrumentality which made the contract. The finding of an exception was in practice coincidental with holding the corporation liable. In every case where a contract was held to be excepted from the negative rule, the corporation was held liable.

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but the view taken *obiter* is at least that where a non-trading corporation has accepted the benefit of an executed *intra vires* parol contract, it is liable. Indeed the *obiter dicta* are open to the construction that the corporation is liable on such a contract though it is still executory — that 'necessarily incidental' in *Clarke v. Cuckfield Union* (1852) 21 L.J.Q.B. 349 (water closets for Union workhouse) and *Nicholson* (1866) L.R. 1 Q.B. 620 (coals for Union workhouse) which had become somewhat obfuscated in *Lawford* [1903] 1 K.B. 722 (preparation of plans and report on proposed sewerage scheme) has become merely 'connected with purpose' in *Wright* [1957] 1 Q.B. 431. But, again it is submitted that this metamorphosis cannot be safety relied upon except where the contract is executed (see p. 433 *post*). Following the *Wright* decision the Corporate Bodies Contracts Act 1960 (U.K.) was passed which freed all bodies corporate from any greater formal requirements in contracting than those applicable to individuals under the general law.

It is doubtful whether those Australian courts still applying the common law in this area will take the final step of holding a non-trading corporation liable on an executory parol contract which is merely 'connected with the purpose' of the corporation. In Victoria, the Instruments (Corporate Bodies Contracts) Act 1967, s. 2 has inserted a new s. 31A in the Instruments Act 1958 the principal provision of which is as follows: '(1) So far as the formalities of making varying and discharging a contract are concerned, any person acting under the authority express or implied of a body corporate may make, vary or discharge any contract in the name or on behalf of the body corporate in the same manner as if that contract were made, varied or discharged by a natural person.'

(2) More liberal exceptions were allowed in respect of the trading contracts of trading corporations and this was a well recognized exception by the time of the first Companies Act of 1844.

(3) In strict legal theory, even though an informal *mode of expressing* corporate contractual assent is allowed, it should still be necessary to show that 'the corporation' has performed a contractual act.

(4) *Prima facie* where an exception exists an actual corporate act might be proved only by showing either an assent of the appropriate constitutional organ formulated in strict accordance with the charter or statute, or an assent by all members of that organ.

(5) Even where an exception was to be allowed the onus should be on the outsider to prove corporate assent, whereas where the seal appeared the onus lay on the corporation to prove *non est factum.*

SECTION B: UNJUST ENRICHMENT

It is necessary in this Section to pass to an entirely new and distinct basis of corporate liability in the absence of the common seal. In its more generalised form this basis may be described as 'the acceptance of the benefit of an executed contract', but the earlier development was concerned specifically with actions for use and occupation.

10 THE ACTION FOR USE AND OCCUPATION

Liability where the corporation had used and occupied, rested upon the inequity of not compelling it to pay. Liability where the corporation's land had been used and occupied rested upon the fact that the consideration moving from the corporation had been provided and therefore no corporate demise needed to be proved to supply mutuality of obligation. In other words, this latter type of case also rested upon the injustice of not compelling payment. Unlike the 'practical necessity' or 'essentiality to purpose' exceptions previously discussed, the obligation of the defendant was not strictly contractual but resided in that area described as 'quasi-contract'. But although the courts referred to the 'moral necessity' of allowing an action, they persisted in speaking of an 'implied contract' to pay for benefit received. Predictably the concept of an implied promise by a corporation which could not make the same promise expressly except according to a certain form, raised peculiar problems.

That an action in debt for use and occupation lay at the suit of a corporation aggregate was established in *Dean and Chapter of Rochester v. Pierce.*[85] Nor did the corporate seal rule avail the defendants to a similar action in *Southwark Bridge Co. v. Sills,*[86] and *Rochester's* case was applied in favour of the plaintiff corporation in *Stafford Corporation*

[85] (1808) 1 Camp. 466 (*'Rochester'*).
[86] (1826) 2 Car. & P. 371.

v. Till[87] where it was held that as the contract was executed by the corporation, no corporate 'promise' needed to be proved to furnish consideration for the defendant's promise.[88] But the Court confused the position somewhat by then holding that the law in such circumstances *implied* a promise by the defendant to pay for the benefit received.[89] The *Stafford Corporation* case was in turn the leading authority on which the court allowed, in the absence of a seal, a corporation's action of *assumpsit* for the use and occupation of certain tolls in *Carmarthen Corporation v. Lewis*.[90]

The question whether 'implied promise' or 'unjust enrichment' was to explain these actions for use and occupation arose directly in *Lowe v. The London and N.W. Ry Co*.[91] This was an action against a railway company for its use and occupation of the plaintiff's land joining the railway line. The plaintiff argued that the corporate seal rule applied only to *express* contracts whereas this one was implied by law; that since a corporation had been held entitled to sue for use and occupation of its own land, there must be a corresponding obligation upon it where it had occupied;[92] and finally that it was a mistake to conceive of this kind of action as contractual at all because it was more truly based upon an obligation imposed by law to pay for an actual enjoyment. Campbell C.J. accepted the argument that the action for use and occupation allowed in favour of a corporation in *Rochester's* case must be reciprocal. He further thought it inappropriate to restrict exceptions to the negative corporate seal rule to cases of 'necessity' unless that word were to be regarded as embracing cases of 'moral necessity'.[93] But the position again becomes confused when all three judges rely on section 97 of the Clauses Act (which empowered the company to contract under the signatures of two directors as an alternative to sealing) as removing any obstacle to the finding of an implied corporate promise. Implied contract seems to be an unsatisfactory basis for such a decision. Liability in such quasi-contractual cases is now generally thought

[87] (1827) 4 Bing. 75 ('*Stafford Corporation*').

[88] In *Rochester supra* n. 85 the action was in debt whereas in *Stafford Corporation supra* n. 87 it was in *assumpsit* but there was held to be no difference in principle. Perhaps an action in debt is preferable in that liability rests upon the executed consideration rather than upon the initial undertaking to pay.

[89] 'But in the present case, the land having been enjoyed by the Defendant, the promise to pay for it is implied, and there is a good consideration for the promise.' *Ibid.* 77 *per* Lord Best C.J.; and 'If a promise could not be implied, an action for use and occupation could never be brought by a corporation.' *Ibid.* 78, *per* Lord Best C.J.

[90] (1834) 6 Car. & P. 608.

[91] (1852) 18 Q.B. 632 ('*Lowe*').

[92] Indeed counsel argued that it was easier to infer that a corporation had occupied than that it had allowed an occupation.

[93] In support of this last proposition he cited *Hall* (*assumpsit* against corporation for the plaintiff's tolls wrongfully taken by it — see n. 46), a decision which must be justified on some basis such as unjust enrichment rather than on any promise to repay. In *Hall* (1844) 5 Q.B. 526 the corporation's liability had been held to be analogous to a tortious liability in trover.

to be better if not satisfactorily based upon 'unjust enrichment' rather than upon 'implied promise'.[94]

11 ACCEPTANCE OF THE BENEFIT OF AN EXECUTED CONTRACT

The action for use and occupation is a particular illustration of a more general principle of liability for benefit accepted. Because of the quasi-contractual nature of that principle, it will not be examined in great depth in this article.

Of course a person is not liable for a benefit foisted upon him without his consent.[95] This is why it is probably better to describe this basis of liability as *acceptance* rather than as *receipt* of a benefit. Therefore in these cases the question should always arise whether there is evidence of 'corporate acceptance'. Unlike contractual assent itself, acceptance need not be expressed externally. After all this very basis of liability was an exception to the corporate seal rule. But the problem of proving *corporate* acceptance must be not overlooked.[96] Even in cases of use and occupation of land this might have posed theoretical difficulty (though not so much where the use and occupation was preceded by an informal but duly authorized demise) and in other cases this could be expected to be inevitable.[97]

[94] This is of course a well explored area. *Cf.* the literature noted in Goff and Jones, *The Law of Restitution* (1966) Ch. i, 3-33; Stoljar, *The Law of Quasi-Contract* (1964) Ch. i, 1-15. The weakness of 'implied promise' reasoning is brought out in *Finlay v. The Bristol & Exeter Ry Co.* (1852) 7 Ex. 409 where the plaintiff failed on a count for use and occupation because the company had not occupied for the nine months sued for. Further, although the company had occupied for three months following the expiry of its express parol lease, it was held that no lease from year to year could thereby be implied so as to make the company liable on a count in contract for the remaining nine months of the first year. If anything was to be *implied*, it should have been a lease from year to year (*cf. Wood v. Tate* (1806) 2 Bos. & P.N.R. 247 noted *infra*). Unjust enrichment conveniently explains the occupant's liability.

'Implied promise' reasoning could not have supported the decision in *Stafford Corporation* (1827) 4 Bing. 75 and tends to conflict with Lord Best's *dictum* in that case.

Two further nineteenth century cases on corporate use and occupation may be noted; *Wood v. Tate* (1806) 2 Bos. & P.N.R. 247 and *Ecclesiastical Commissioners v. Merral* (1869) L.R. 4 Ex. 162. The effect of the former was that a tenancy from year to year could be implied where a lease document had not been sealed by the lessor corporation but the 'lessee' had taken possession and paid rent. The effect of the latter case was that not only might an action for use and occupation be brought in such circumstances but that the unexecuted document could be looked to to determine the terms of the implied tenancy: *e.g.* a convenant to keep in repair could be implied by reason of its having been expressed in the document.

[95] *Cf. Homersham v. Wolverhampton Waterworks Co.* (1851) 6 Exch. 137.

[96] Sometimes a corporate acceptance was admitted; *cf.* the acceptance of rent in *Doe d. Pennington v. Tanière* (1848) 12 Q.B. 998.

[97] Of course acceptance of benefit alone did not make the accepting corporation liable to pay — the contract had to be 'incident to the purposes for which the defendants were incorporated.' (*Paine v. Strand Union* (1846) 15 L.J. (N.S.) M.C. 89, 92 *per* Lord Denman C.J.). It is thought that this requirement meant no more than that the contract had to be *intra vires* the corporation and is always to be distinguished from the 'essentiality to purpose' basis of corporate contractual liability discussed previously. It may be noted further that the contract had to be a post-incorporation contract; *In re Rotheram Alum v. Chemical Co.* (1883) 25 Ch.D. 103; and that there must be no mandatory prescribed statutory mode of contracting; *Young v. Leamington Corporation* (1882) 8 Q.B.D. 579 (C.A.).

There is a distinction between cases where the corporation has accepted the benefit of the other party's performance, and cases where the corporation's own performance supplied the mutuality of obligation necessary to render the other party liable. The paradigm case is that of acceptance by the corporation. In *Marshall v. Queenborough Corporation*[98] and *Wilmot v. Coventry Corporation*[99] it was recognized that the furnishing of consideration by the other party on the faith of the corporation's minuted resolution was a sufficient basis on which a court of equity might order specific performance by a corporation of its resolution. In *Pauling v. London & N.W. Ry Co.*[1] a railway company was held liable on a parol contract made without authority by its engineer's clerk for the purchase of railway sleepers which were found to have been *received and used* by the company. The Court of Exchequer's reasoning followed that in *Lowe* to the effect (1) that receipt and use of the goods *in the company's business* was evidence for the jury that 'the directors' must be taken to have made the contract; and (2) that there was no objection to finding an 'implied contract since it was within the directors' power to bind the company by parol by virtue of section 97 of the Clauses Act!

Acceptance by the statutory company was thus conceived of, under the influence of section 97 of the Act and of 'implied contract' reasoning, as an acceptance participated in by at least two directors and this was readily inferred where goods were received by a company's employees and used openly in its business. But this approach is open to question. In the first place it presupposes that under section 97 two directors had power to *formulate* corporate assent. But under the section it is 'the directors' or a committee thereof appointed under section 95 which has that power. Section 97 merely prescribes what is to be a sufficient *appearance* of assent as an alternative to the seal.[2] But where external expression of assent is irrelevant, as in 'acceptance of benefit' situations, what should be required is that the corporate 'mind' (however that should be defined) has accepted. Of course the requirement that two directors should have participated was a part of 'implied promise' reasoning and it may be readily conceded that two directors could have bound the company by an *expression* of contractual assent.[3]

[98] (1823) 1 Sim. & St. 520 ('*Marshall*').

[99] (1835) 1 Y. & C. Ex. 518 ('*Wilmot*'). In an earlier case of *Tilson v. Warwick Gas Light Co.* (1826) 4 B. & C. 962, acceptance of the benefit was argued by the plaintiff but not dealt with because the defendant corporation was held liable on another basis.

[1] (1853) 8 Exch. 867 ('*Pauling*').

[2] *Cf.* the similar legislative provision in s. 44 of the first Companies Act of 1844 which provided that the classes of contract specified (describable as 'substantial' contracts) should be in writing, signed by at least two directors and sealed or signed by an officer 'thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case'.

[3] The difficulty discussed illustrates the desirability of insisting on a distinction between the formulation and the expression of contractual assent.

The Fishmongers' Co. v. Robertson[4] is an illustration of acceptance by the outsider of the corporation's own performance.[5] The Fishmongers' Company of London had, by the agency of its solicitor, agreed to withdraw its opposition to the defendant's parliamentary Bill for the defendant's promise to pay to the company £1,000 and to return certain plans *etc.* To the company's action the defendants pleaded want of mutuality *via* the corporate seal rule. But the Court of Common Pleas held that since the contract had been performed by the corporation, and the defendants had accepted the benefit thereof, the latter could not 'upon the general ground of reason and justice'[6] be permitted to raise the objection.[7] The question whether a performance could be said to be that of 'the corporation' (like the question raised earlier of whether an acceptance can be said to be a 'corporate' acceptance) does not seem to have caused contention.[8]

Sometimes a corporation's acceptance of the benefit of an executed contract was described in other terms; *e.g.* 'acquiescence', 'ratification', or 'adoption' as in *Laird v. The Birkenhead Railway Co.*,[9] *De Grave v. Monmouth Corporation*[10] and *Trainor v. Council of Kilmore*[11] respectively. Whilst 'acceptance of benefit' will give rise to these, they may exist without it and are therefore independent grounds of liability. Similarly, in some cases it was held both that a particular executed contract was *essential* to the achievement of a corporation's purpose *and* that the corporation had accepted the benefit of its execution.[12] In *Scott v. Clifton School Board*[13] Matthew J. even thought that a corporation's acceptance of the benefit of an executed contract established its 'necessity' and both 'acceptance of benefit' and 'essentiality to purpose' were found in *Lawford v. Billericay R.D.C.*[14] Interestingly, when acceptance of benefit and

[4] (1843) 5 M. & G. 131.

[5] Other examples are *City of London Gas; Wilmot supra* n. 99; *Steevens Hospital, Dublin v. Dyas* (1863) 15 1 Ch. R. 405; and *Kidderminster Corporation v. Hardwick* (1873) L.R. 9 Ex. 13.

[6] (1843) 5 M. & G. 131, 193 *per* Tindal, C.J.

[7] An additional ground for the decision; *viz* that the corporation's act in suing estopped if from denying the contract, was rejected in *Kidderminster Corporation v. Hardwick supra* n. 5 (see n. 28 *infra*).

[8] It was argued that the corporation's solicitor's promise had not been that of the corporation but the Court held that the corporation's subsequent performance rendered this issue otiose.

[9] (1860) Johns 500 ('*Laird*').

[10] (1830) 4 Car. & P. 111 ('*De Grave*').

[11] (1862) 1 W. & W. 293 (Eq.). There was 'adoption' of the benefit of the iron gages supplied in *Sanders* (1846) 8 Q.B. 810, and 'adoption' by a corporation of the acts of its agent was held to be the result of its acceptance of the benefit of his wrongful distress in *Smith v. Birmingham etc.* (1834) 1 Ad. & E. 526.

[12] This was so for example in *Nicholson* (1866) L.R. 1 Q.B. 620 (coals supplied to Union workhouse) in which Blackburn J. expressly noted that it was not necessary to decide what the position would have been if the contract had been entirely executory.

[13] (1884) 14 Q.B.D. 500.

[14] [1903] 1 K.B. 772 (C.A.) ('*Lawford*'). In yet other cases which were decided on the basis of 'essentiality to purpose', it seems that the decision to hold the corporation liable might as well have been based upon the corporation's acceptance

essentiality coincide the case is analogous to that of the supply of 'necessaries' to an infant. The moral necessity of holding a corporation liable where it has accepted the benefit of an executed contract was mentioned in many judgments, often with undertones of moral idignation.[15]

A corporation which had 'accepted', should be liable for the same moralistic reasons that would govern an individual in a similar situation. But the other party's performance was also sometimes said to raise a presumption that the corporation had regularly incurred a contractual obligation initially.[16] The reasoning appears to be that the corporation's conduct towards the other contracting party has estopped it from raising the defence of contractual informality. A problem with this view is that in many cases there will be no reliance, inducement or detriment arising from the acceptance of the benfit — the acceptance being often entirely subsequent to the other party's performance.

Nonetheless this view was taken a very long way in *Hoare & Co. Ltd v. Lewisham Corporation*.[17] A borough corporation agreed with a publican that the latter should be permitted to re-locate a signpost in consideration of certain far more substantial benefits which he was to furnish and did in fact furnish to the public *via* the corporation. Section 72 of the Metropolis Management Amendment Act 1862 (Eng.) gave large powers (including power to make such an agreement) to borough councils 'with the previous consent in writing of the Metropolitan Board of Works'. Collins M.R. said,

> [t]he bargain between the plaintiffs and the dependants certainly gave great benefits to the defendants, and the defendants had power to produce a sanction which probably would have been given for what would undoubtedly be a great public improvement. There was no allegation in the pleadings that the agreement was ultra vires, and I think that, as the defendants have taken the benefit of the agreement, and have deliberately acted as if they had obtained such sanction as was necessary to enable them to enter into the agreement, the court should presume that they have acted lawfully in what they have done, that they did all things which were necessary as a condition precedent to enable them to make the agreement.[18]

of the benefit of an executed contract; *cf. Sanders* (1846) 8 Q.B. 810; *Clarke v. Cuckfield Union* (1852) 21 L.J.Q.B. 349.

[15] An example is *Connolly v. Shire of Beechworth* (1876) 2 V.L.R. 1 (Eq.) in which Molesworth J. said, 'Courts of equity do not allow corporations to use their incompetency to act without seal, to obtain the advantages of incomplete bargains, and then repudiate them in a manner which would operate as fraud'. (*ibid.* 15). Similar moralistic argument and *dicta* are to be found in *Haigh* (1858) E.B. & E. 873; *Melbourne Banking Corporation v. Brougham* (1879) 4 App.Cas. 156 (P.C.) and *Hoare & Co.* (1902) 24 T.L.R. 322.

[16] *Cf.* Lord Denman C.J. in *Doe d. Pennington v. Tanière* (1848) 12 Q.B. 998; and *dicta* in *Melbourne Banking Corporation v. Brougham* (1879) 4 App.Cas. 156 (P.C.) and in *Bourne & Hollingsworth* (1908) 24 T.L.R. 322.

[17] (1902) 87 L.T.R. 464 (C.A.) ('*Hoare*').

[18] *Ibid.* 465. In this case as in so many others, it was not contested that 'the corporation' had 'taken the benefit' *etc.*

Admittedly acceptance of the benefit[19] of an executed contract may well raise a presumption that a corporation's mind has regularly assented where any irregularity would be known only to the corporation. But it appears that the foregoing generalization comes close to supporting a proposition that such acceptance raises a presumption that even prerequisites necessary to make a particular contract *intra vires* the corporation itself have been satisfied. The possiblity of such a presumption was expressly rejected in *Pacific Coast Coal Mines v. Arbuthnot*.[20]

Of course such a problem forces one back to the question how to distinguish between legal capacity of the corporation on the one hand and the powers of its constitutional organs and (at least in the case of registered companies) the authorities of its agents on the other. In respect of registered companies the solution is facilitated by the fact that usually objects (on which the law operates to create legal capacity) are stated in one document and internal distribution of power in another,[21] whereas in both *Hoare* and *Pacific Coast* only one document, a statute, was in question. One could attempt to reconcile the two decisions by reasoning that the consent of the Metropolitan Board of Works in the former case was an internal prerequisite to the exercise by the borough council of a general power already vested in it whereas in the second case the company itself was without the relevant power in the absence of the shareholders' resolution. But such a distinction is artificial and unconvincing. It is simply not possible to reconcile all the decisions as to whether a prerequisite is a condition precedent to the corporation's acquiring legal capacity or an internal condition precedent to an organ's becoming absolutely seized of constitutional power.[22]

Where a statute or an earlier sealed contract (as distinct from merely the common law) required a contract to be made in a particular form, and the requirement was held to be mandatory, it prevailed even though the corporation had accepted the benefit of the other party's performance.[23]

[19] It appears that 'acceptance of the benefit' is used in a different sense in this case from the sense in which it is used in the other cases examined. This was not an instance of work being performed for the corporation for a fee but for a permit, both the work and the permit being part of a total arrangement for street redevelopment in which the rights and obligations of public authority and private landowner were compromised. The other party having been induced by the corporation to act on the faith of that arrangement and to the benefit of the corporation, the corporation should be estopped from denying the promise to grant a permit. A better explanation of the decision is thus thought to be in terms of estoppel.

[20] [1917] A.C. 607 (P.C.) ('*Pacific Coast*'). And *cf. Commercial Bank of Canada v. G.W. Ry of Canada* (1865) 3 Moo P.C. (N.S.) 295.

[21] Even in respect of registered companies the problem is made real by the doctrine of constructive notice.

[22] It is suggested that a test is to ask whether the body corporate can dispense with compliance; though this itself may beg the question.

[23] *Cf. Young v. Leamington Corporation* (1882) 8 Q.B.D. 579 (C.A. and the other cases under the Public Health Act 1875 (U.K.), (s. 17 whereof made sealing mandatory in respect of certain substantial contracts by urban authorities); and *Lamprell* (1849) 3 Ex. 283, *Kirk v. Bromley Union* (1848) 2 Ph. 640; and perhaps *Barker* (1863) 2 W.W. 315(L.). *Barker* was an action against a municipal council

But where the seal was required only by common law rule, the acceptance by the corporation both rendered the corporation liable to pay and precluded an objection by third parties against a corporate payment made for the benefit received.[24]

12 THE EARLY DISTINCTION BETWEEN EXECUTORY AND EXECUTED CONTRACTS

The two exceptions last examined are quasi-contractual. Unlike the exceptions examined earlier, they did not give rise to a truly contractual liability. Principles of morality provided a force alternative to that which arose from a purchased promise or the appearance of the seal.

In the early case of *East London Water Works Co. v. Bailey & Ors*[25] it was held that exceptions to the corporate seal rule were *restricted* to cases of executed contracts. But if 'practical necessity' or 'essentiality to achievement of the purpose of incorporation' were to be sufficient tests of excepting from the general rule, there was no reason why a parol *executory* contract satisfying either of these tests should not bind. This was recognized in *Church*[26] which overruled the *East London Waterworks* case. A 'necessary' contract or an 'essential' contract could be seen to be binding at the moment of contract but an executed *intra vires* contract within classes 10 and 11 would not be known to be binding until after performance. Only after a struggle[27] did classes 1 to 9 come to be regarded as true exceptions to the negative rule and therefore quite applicable to executory contracts.

on its parol acceptance of a tender for the construction of a dam and reservoir where the work was completed. The decision is difficult to justify unless it be on same basis such as that presently being discussed; *viz*, that the original contractual intention was that the corporation would not be deemed to have accepted the benefit of performance until its engineer certified that the work had been duly completed.

[24] *R. v. Prest* (1850) 16 Q.B. 32; *Bournemouth Commissioners v. Watts* (1884) 14 Q.B.D. 87; *Stewart v. Mooney* (1897) 18 L.R. (N.S.W.) Eq. 178.

[25] (1827) 4 Bing. 283. 'The directors may, indeed, of their own authority, make a bargain under the provisions of this clause in the Act; but they must make such bargain in the usual way; the company must express their assent in the mode prescribed by law, by a writing under their common seal.' (*ibid.* 289 *per* Lord Best C.J.).

[26] The judgment in *Church* (1838) 6 Ad. & E. 846, like many others of the time dealing with 'unjust enrichment' situations, somewhat confuses the position by trying to accommodate them under the rationale of 'implied contract'.

[27] In spite of the decision in *Church* (1838) 6 Ad. & E. 846, it continued to be suggested for some time that a corporation was not liable on a parol contract which remained wholly executory (as in *Doe d. Pennington* (1848) 12 Q.B. 998; *Copper Miners* (1851) 16 Q.B. 229; *Marzetti* (1855) 11 Ex. 228; *Barker* and *Nicholson*) though sometimes the contract was found to be executed so the issue did not call for decision (as in *Copper Miners, Marzetti* and *Nicholson*). In *Barker* (1863) 2 W.W. 315(L.) a municipal corporation was held not liable on an executory contract for the construction of a reservoir but *Church* was not referred to in the judgment. Actions on parol employment contracts by a corporation's medical officer (in *Dyte's* case (1872) 27 L.T.R. (N.S.) 342) and a workhouse master's clerk (in *Austin's* case (1874) L.R. 9 C.P. 91) against Union guardians for pay in lieu of notice and damages for wrongful dismissal respectively, failed. As late as 1879 in *Melbourne Banking Corporation v. Brougham* (1879) 4 App. Cas. 156 (P.C.) the Privy Council expresses or implies doubts about the liability of a corporation on a parol executory contract, though it was not doubted that it would be liable where it had *accepted the benefit*

SECTION C: 'ESTOPPEL BY ACQUIESCENCE' AND 'RATIFICATION' (OR 'ADOPTION')

Although the terms 'acquiescence', 'ratification' and 'adoption' have not been used either in the cases or elsewhere always with awareness of their distinct legal meanings, it is clear that 'ratification' signifies a unilateral act by a principal subsequent to the purported making of a contract on his behalf, electing to be bound by that contract. In the agency-contractual context, 'adoption' has the same meaning. 'Acquiescence' however, signifies not only a knowledge and non-repudiation subsequent to a representative act, but also a knowledge and non-repudiation of an act or of a course of action *before* or *contemporaneously with* it, which gives rise to a representation or holding out to an outsider by which, if acted upon by that outsider, the principal will be estopped.

13 ESTOPPEL BY ACQUIESCENCE

Estoppel by representation, particularly by a corporate acquiescence in a state of affairs on the authenticity of which an outsider relies, developed into an early exception to the negative rule.[28]

of an executed contract. Whether the *Clarke v. Cuckfield Union* (1852) 21 L.J.Q.B. 349, line of exceptions (essential contracts) was valid was strongly doubted in *Smart* (1855) 10 Ex. 867. Although these doubts were dismissed in *Nicholson* (1866) L.R. 1 Q.B. 620, the Court there itself had some doubts caused by the decision in *London Dock v. Sinnott* (1857) 8 E. & B. 347. Even in *Lawford* [1903] 1 K.B. 772 (an engineer's action for fees for work done in preparing plans and a report in respect to a proposed drainage scheme) in which the Court of Appeal once and for all established the validity and independence of the 'essential contracts' exception originally allowed in *Clarke v. Cuckfield Union*, Vaughan Williams L.J. confuses the position by introducing the concept of 'benefit of the contract' and by citing *De Grave* and *Doe d. Pennington v. Tanière* (both cases of executed contracts). And in *Bourne & Hollingsworth* (1908) 24 T.L.R. 322, Ridley J. finds that the corporation there had received the benefit of a contract because it had received the other party's promise!

In 1869 Lord Romilly M.R. in *Re Contract Corporation; Ebbw Vale Co.'s Claim* (1869) L.R. 8 Eq. 14) had no difficulty in holding a joint stock railway company liable for non-acceptance on a parol executory contract made by its secretary for the purchase of rails (though it must be conceded that the corporate seal rule was not argued).

[28] The present section of this article is not concerned with the estoppel which underlies the apparent authority of an agent. The course of action being discussed in this section of the article which is acquiesced in by the corporation, is typically conduct by the outsider who is dealing with the corporation.

Estoppel by record should be mentioned. In *Fishmongers' Co. v. Robertson* (1843) 5 M. & G. 131, a corporation sued on the defendant's promise to pay a sum for the corporation's withdrawal (since performed) of its opposition to a certain parliamentary Bill. The defendants argued *nudum pactum* in that the plaintiff had never, in the absence of its seal, been bound by its own promise. The judgment of the Court of Common Pleas actually seems to propound two principles: (1) that an estoppel arising from action brought supplies the want of mutuality; (2) that the performance by the corporation itself supplies the want of mutuality, for thereafter the other party cannot want to sue the corporation. The decision was based on the second proposition and the former was merely suggested *obiter*. A significant difference between the two is that the former theory would enable a corporation at its whim to make a contract binding on the other contracting party by suing him. It is strictly true that even in accord with the second proposition the agreement is *nudum pactum* until performance by the corporation and that until that moment

Conduct, and in particular acquiescence, which could be regarded as that of the corporation, should, on principle, estop it just as it would estop an individual. It was readily assumed that a corporation could conduct itself and acquiesce without resorting to the only means of expressing contractual assent. This seems inevitable since acquiescence, like the acceptance of the benefit of a contract, does not necessitate external expression. Acquiescence consists of knowledge coupled with inaction (in particular a non-repudiation).

Nonetheless estoppel by acquiescence involves difficult questions of whose knowledge, conduct or inaction is to be considered that of the corporation.[29] Estoppel might of course arise against a shareholder[30] or even against all the shareholders of a company.[31] But there is the peculiar difficulty associated with a body corporate itself that it is by nature 'silent' and 'inactive'. Since under the general law a corporation can be estopped by acquiescence only if it is 'cognisant' of a situation and remains silent about it, the two major questions arise, (1) Whose knowledge and conduct will be deemed that of the corporation for this purpose? and (2) Was a particular corporation capable of being other than silent and inactive?

The precise questions mentioned were not answered in the nineteenth century cases in relation to chartered and statutory companies[32] or for that matter in cases concerning the registered company. Those cases did however, establish some principles as to corporate acquiescence. Certainly knowledge embodied in a regular corporate resolution would be that of the corporation.[33] The corporate representations relied upon, although they may be representations by silence or inaction[34] must be more than a

arrives either party could retract. But possibly the caprice of a sudden corporate performance is not tinged with the same injustice as a sudden corporate prosecution. (*Fishmongers' Co. v. Robertson* was followed in *M.C. of Sydney v. M'Beath* (1881) 2 L.R. (N.S.W.) 142 (L.).

Estoppel by record was again raised in *Copper Miners* but Lord Campbell C.J. reasoned that mutuality must exist *when the contract was made.* And the *obiter dictum* of Tindal C.J. in the *Fishmongers' Co. v. Robertson* was finally disapproved in *Kidderminster Corporation v. Hardwick* (1873) L.R. 9 Ex. 13) where it was held that an initial want of mutuality is not cured by a corporation's act of suing: 'The action is brought by a corporation for breach of an executory contract, and it is open to the defendant, under the circumstances, to shew that, though it was signed by himself, it was not binding on him in consequence of the plaintiff's not being bound.' (*ibid.* 23) *per* Pollock B.

[29] Professor Gower notes, 'The whole question of the effect of acquiescence on corporate irregularities is one of immense difficulty.' (Gower, *op. cit.* 210 n. 26.)

[30] *York Tramways Co. v. Willows* (1882) 8 Q.B.D. 685 (C.A.).

[31] *Maclae v. Sutherland* (1854) 3 El. & Bl. 1; *City Bank v. The Australian Paper Co.* (1871) 10 S.C.R. (N.S.W.) 235 (L.).

[32] *Cf.* in *Macher v. The Foundling Hospital* (1813) 1 V. & B. 188: 'The real Question is, whether from the Circumstance of Notice to some of the Members the Corporation can be considered as bound; having stood by, permitting Expenditure; and upon that it will be necessary to look very strictly into the Answer.' (*ibid.* 191-2). But the answer was not given.

[33] *Obiter dicta* in *Marshall* (1923) 1 Sim. & St 520; *ratio* in *Connolly v. Shire of Beechworth* (1876) 2 V.L.R. 1 (Eq.).

[34] *Cf.* Schroeder J.A. in *Walton v. Bank of Nova Scotia* (1964) 43 D.L.R. 2d 611.

bare promise or acquiescenec in a bare promise. Thus in *Wilmot v. Coventry Corporation*[35] a municipal corporation resolved to pay an existing antecedent debt and although recorded in the minute book, the resolution was never expressed under seal. The corporation's officers conducted themselves for some time as if the corporation were bound by the resolution. But the corporation was not estopped. The position would have been otherwise if the outsider had furnished consideration or acted to his detriment in reliance on the resolution.[36]

The courts do not seem to have distinguished between acquiescence by a corporation's constitutional organs and acquiesence by its servants though in some cases it may have been assumed that 'the directors' knew what the servants knew. In *Laird v. The Birkenhead Ry Co.*[37] for example, although the plaintiff's performance was said to have taken place in the presence of the company's 'servants',[38] yet by reason of the public and visible nature of the work its execution must have been known to the directors.

Certain cases involving a corporate acquiescence may be noted. An early Australian case was *Trainor v. M.C. of Kilmore*.[39] A Victorian municipal council resolved to purchase the land on which the town hall stood. Later, illegally elected councillors paid the purchase price; the town clerk took delivery of the conveyance (which had been prepared by the council's solicitor) executed by the vendor and retained it for the council; the council ceased paying rent for the land. After the council had held both land and conveyance for two years it was held that it had acquiesced and was therefore liable to reimburse the *de facto* councillors for their payments on its behalf. In *Wilson v. West Hartlepool Ry Co.*[40] there were acts of part performance (allowing the plaintiff into possession) by a corporation of its manager's contract to sell land to the plaintiff who sought specific performance. Those acts were described as being by 'every member of the company, who attended to the affairs and business of the company, and every officer and servant of the company'.[41] In *Crook v. Seaford Corporation*[42] a municipal corporation resolved in 1860 to let to the plaintiff part

[35] (1835) 1 Y. & C. Ex. 518 (*'Wilmot'*).

[36] Accordingly such a wide basis of liability as that propounded by Erle J. in *Henderson* (1855) 5 E1. & B1. 409 ('it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal . . .' (*ibid.* 417) must be read subject to an assumption that the outsider has acted in reliance on the holding out. The passage begs the questions. 'What is the corporation?' and How can there be a 'semblance of a contract' without the common seal?

[37] (1859) Johns 500 (*'Laird'*).

[38] 'when works of this character are made on the spot where a company may be said to be present, where its premises are situated and its operations carried on, the company, though an incorporated body, must be considered for all purposes of knowledge and acquiescence to be in the same position as a private individual, and will be bound in the same way by acquiescence, so far as that can be inferred from what was done on the company's own premises.' (*ibid.* 510 *per* Wood V.-C.).

[39] (1862) 1 W. & W. 293 (Eq.).

[40] (1864) 34 Beav. 187 affirmed (1865) 2 De G. J. & S. 475.

[41] *Ibid.* 191 *per* Lord Romilly M.R.

[42] (1871) 6 Ch. App. 551 (*'Crook'*).

of a beach opposite the plaintiff's field for three hundred years at a nominal rent. Thereupon the plaintiff built a terrace and wall on the subject land. In 1864 the corporation gave to the plaintiff notice to quit and brought ejectment proceedings. The plaintiff then brought the present suit for specific performance. The corporation was held bound by its 'acquiescence':

> [b]ut a corporation, although it may not have eyes to see what is going on, has *agents* who can see, and if the corporation allows a wall to be built and money to be expended on the faith of a resolution regularly entered in their books, they must be answerable.[43]

If anything, the foregoing cases seem, with reference to the first question posed, to attribute to the company the knowledge of the company's 'functional organs' (an expression which will often embrace such persons as managers, who will not be or be part of their company's 'constitutional organs') in that they speak of the individuals who in fact attended to its affairs. But such a 'principle' is so nebulous that it says virtually nothing. There have, however, been decisions on whether the knowledge of particular individuals in particular circumstances is to be attributed to a company. Neither notice to one shareholder (even though he is also secretary of the company)[44] nor notice to one director[45] is notice to the company. But knowledge acquired, no matter how or from whom, by 'the directors' in their official capacity and acted upon by them is knowledge of the company.[46] Notice to a managing director in respect of something under his management is notice to the company[47] but notice to a proper officer will not be notice to his company if given in an 'improper' context or on an improper occasion.[48] Questions of whether an agent's knowldege is to be imputed to his company was largely worked out in cases concerning insurance companies.[49] The directors of a company or at least some person

[43] *Ibid.* 554 *per* Lord Hatherley. Emphasis supplied. How is this case distinguished from *Ludlow* (1840) 6 M. & W. 815? (*Ludlow* was apparently not cited in *Crook* (1871) 6 Ch. App. 551). In the present case it was the granting of the lease which was disputed and the actions of the plaintiff, acquiesced in by the defendants, went to prove that. In *Ludlow* the lease was admitted and the dispute centered about an ancillary arrangement that if the lessee did certain work he should be paid. The plaintiff's doing of work on the corporation's land, with its knowledge, where that land is in the possession of the plaintiff for four years, is good evidence of a representation of the granting of a lease (*Crook*); but the performance of work by a lessee on demised premises and construction of a road adjoining is not a representation by the corporation-lessor that the lessee shall be paid for it by the lessor (*Ludlow*). The distinction is brought out in *Crampton* (1872) L.R. 7 Ch. App. 562, where the person improving the corporation's land did so as a contractor rather than as owner or lessee. Only in the latter type of case might the corporation be estopped.

[44] *Ex pte Boulton* (1857) 1 De Gex. & J. 163.

[45] *Cole v. Wellington Dairy Farmers' Co-operative Association Ltd* [1917] N.Z.L.R. 372; *Re: Cleadon Trust Ltd* [1939] Ch. 286 (C.A.).

[46] *Ex pte Agra Bank; in re Worcester* (1868) L.R. 3 Ch. App. 555; *Houghton & Co. v. Nothard, Lowe & Wills Ltd* [1927] 1 K.B. 246 (C.A.).

[47] *Jaeger's Sanitary Woollen System Co. v. Walker & Sons* (1897) 77 L.T.R. 180 (C.A.).

[48] As where notice was given to a company secretary at a funeral; *Société Générale de Paris v. Tramways Union* (1884) 14 Q.B.D. 424.

[49] *E.g.* cases on questions as to whether the insurer had been notified of the assignment of a policy so as to take it out of the 'possession order and disposition'

indicated by them as the general managing agent or representative of a registered company within a certain locality will be the ears and mind of the company for the purpose of knowledge and receipt of information there.[50] And in one case the knowledge of an inferior officer has been held to affect the corporation even to the extent of defeating a sealed contract.[51] It has sometimes been argued that the mind of the company can be known only by means of a resolution embodied in a minute,[52] but it is clear from the cases examined earlier that even before the development of the 'modern organic theory' the 'knowledge' of the company was often found loosely in the mind/s of its servant/s and officer/s.

With reference to the second ingredient of acquiescence, *viz*, a possibility of repudiation, the courts seem to have taken a constitutional law approach. The question of corporate acquiescence was dealt with at length in *Re Cleadon Trust Ltd*.[53] A director sought to recover monies which he had advanced for payment of debts of the company's two subsidiaries, repayment of which had been guaranteed by the company. He relied *inter alia* upon alleged acquiescence of the company. But the company had only three officers: two directors (of whom he was one) and a secretary. The company's articles prohibited an 'interested' director from voting. The quorum of directors being two, it was quite impossible for this company to act — it was suffering from 'legal paralysis'.[54] Because it could not act (which seems to be the same thing as saying that it had no mind) it could not 'know' and it certainly could not repudiate or disclaim. That being so it could not be said to have acquiesced.[55] *Re Cleadon Trust Ltd* seems to have laid down that a minimal requirement for acquiescence to exist is that knowledge must be sheeted home to that constitutional organ or

of a bankrupt assured; *cf. Gale v. Lewis* (1846) 9 Q.B. 730; *Alletson v. Chichester* (1875) L.R. 10 C.P. 319; and cases concerning information communicated to an insurance company's agent at the time of completion of the proposal form; *cf. Bawden v. London, Edinburgh & Glasgow Assurance Co. Ltd* [1892] 2 Q.B. 534 (C.A.); *Biggar v. Rock Life Assurance Co.* [1902] 1 K.B. 516; *Newsholme Bros v. Road Transport & General Insurance Co.* [1929] 2 K.B. 356 (C.A.); *Evans v. Employers' Mutual Insurance Association Ltd* (1935) 152 L.T.R. 333.

[50] A communication sent to a company at its place of business will be taken to have reached its 'mind' because that mode of reaching the company's mind had been held out to the world as appropriate: *Kirkpatrick v. South Australian Insurance Company Ltd* (1886) 11 App. Cas. 177 (P.C.).

[51] *A. Roberts & Co. v. Leicestershire County Council* [1961] 2 W.L.R. 1000 (noted by G.A.H. in 'Estoppel of statutory corporations' (1961) 105 *Solicitors' Journal* 1076), a case decided before the Corporate Bodies' Contracts Act 1960 (U.K.).

[52] *Cf. Meynell v. Surtees* (1854) 3 Sm. & Giff. 101; *Bourke v. Alexandra Hotel Co.* (1877) 25 W.R. 393 (C.A.); *Macarthy v. Wellington Corporation* (1889) 8 N.Z.L.R. 168.

[53] [1939] Ch. 286 (C.A.).

[54] 'in any matter in which action by the company, that is by the juridicial persona, was necessary, it could not act at all. It was still the outer shell of a persona, but it was paralysed and could neither request nor agree nor instruct nor authorize — in short, could not do anything within the sphere of management of the company's business.' (*ibid.* 309 *per* Scott L.J.).

[55] It might be thought that such reasoning depended upon an 'implied contract' rationale of quasi-contractual liability and that even a paralysed company would be liable for 'unjust enrichment'. But as Scott L.J. pointed out, although 'implied

(where there is a power of delegation) that agent or functional organ which has power to disclaim or repudiate on behalf of the company. This principle, evolved in a registered company case, is in principle applicable to chartered and statutory companies also.[56]

14 RATIFICATION OR ADOPTION

Though a corporation might not be bound *ab initio* by a parol contract, the negative rule might be circumvented by a finding that the corporation had effectively ratified or adopted a parol contract.[57] Again the question arises, whose knowledge and actions will be attributed to the corporation for the purpose of a corporate ratification? There was no difficulty where the acts of ratification occurred at a regular corporate meeting.[58] Ratification was a secondary basis of corporate liability in several cases.[59]

Prima facie, it seems clear that to be effective, a ratification must be by a person or persons who would have had power to contract for the company initially. Since ratification is a question of intention and need not be communicated, the question resolves itself into the issue of whether the relevant constitutional organ, or, if delegation be a possibility under the constitutive documents, a relevant agent or functional organ has shown an intention to ratify.

contract' can mean either a real consensual contract inferred as a conclusion of fact, or a 'contract implied in law' where there is no agreement in fact but a right of action based on so-called 'equitable' principles, yet even for the latter, it is necessary that the company should have something to do with the transaction. It must have implicated itself. Here, as both Scott and Clauson L.JJ. stressed, the company did not and could not even 'use' the plaintiff's money.

[56] It is an interesting question whether repudiation was a possibility in *Trainor v. M.C. of Kilmore* (1862) 1 W. & W. 293 (Eq.), if only the illegally elected councillors held office during the relevant period.

[57] The problem of informal ratification by the members of a registered company and its inconsistency with a strict theory of separate legal entity has been noted in the standard texts; *cf.* Gower, *op. cit.* Ch. X, 'Lifting the Veil' 208-10.

[58] The Court in *De Grave* found that a corporation had, by examining goods bought on its behalf, ratified the purchase. ((1830) 4 Car. & P. 111-2 *per* Lord Tenterden).

[59] A ratification by directors of a contract made by their chairman without authority bound a telegraph company in *Reuter* (1856) E1. & B1. 341 where, although the company's deed of settlement required the making of the contract to be in writing and signed by the three directors, a ratification based on inferred knowledge of 'the directors' and the drawing of cheques under the contract bound the company. The making of a payment by a corporation was similarly the act evidencing ratification in *Cheetham v. Manchester Corporation* ((1875) L.R. 10 C.P. 249). Ratification by the directors was found in the leading case of *Wilson v. West Hartlepool Harbour & Rail Co.* (1864) 34 Beav. 187 affirmed in ((1865) 2 De G.J. & Sim. 475). There the court also had to deal with a prescribed mode of contracting (under s. 97 of the Clauses Act) which had not been complied with. The court construed the section as permissive rather than mandatory and held in those circumstances that since the company *via* 'the directors' could have contracted informally initially, so it could *via* 'the directors' ratify informally.

ACTIONS AGAINST CORPORATIONS FOR THE TORTS OF THEIR SERVANTS

It is noteworthy that concurrently with the breakdown of the negative rule as it applied to the making of contracts, there was a breakdown of the rule in so far as it might preclude corporate liability for the torts of a corporation's servants. The latter, though generally outside the scope of this article, may be briefly noted.

A strict application of the negative rule would seem to require that a corporation have appointed the actual tortfeasor under seal. It might even require that the tort have been committed under seal.[60] The collapse of the negative rule in the delictual context occurred through such early decisions as *Yarborough v. Bank of England*[61] and *Smith v. Birmingham & Staffordshire Gas Light Co.*[62] and thereafter the range of torts for which a corporation could be liable was extended.[63] A similar development occurred in relation to corporate liability for crime,[64] and although the courts were to be much occupied with questions of 'course of employment',

[60] Since the seal must be affixed by human agents, a tort committed in a sealed writing would seem itself to involve vicarious as well as personal liability on the part of the corporation. *Cf.* the discussion of forgery in the writer's article which was a precursor to this one, 'The Positive Corporate Seal Rule and Exceptions thereto and the Rule in *Turquand's* Case' (1973) 9 *M.U.L.R.* 192, 211-8.

[61] (1812) 16 East. 6. This decision is not however, as conclusive as has sometimes been thought, since Lord Ellenborough merely said that if a sealed authorization of the defendant bank's servants (who were alleged to have converted the plaintiff's promissory notes) was a prerequisite of liability, it must be presumed in the case before him that it had been proved at the trial ('In the present case, which is after verdict, it must be presumed that a competent conversion was proved; and if it be essential to such conversion that there should have been authority from the company under seal to detain the notes on their behalf, that such authority was proved.' (*ibid.* 11)). His Lordship did think however that in *R. v. John Bigg* (where the same bank's employee had stolen a bank note), 'The majority of the Judges who sustained the conviction must have been of opinion that an authority under their common seal was not essentially necessary for such a purpose . . .' (*ibid.* 11-2).

[62] (1834) 1 Ad. & E. 526 where a statutory company was held liable for a wrongful distress by its servant appointed by parol. Lord Denman C.J. thought that the servant's agency could be proved by evidence of ' . . . persons acting in a way in which no one would act without authority'. He also thought that the company's receipt of the benefit of the distress was some evidence of the tortfeasor's authority. Littledale J. considered that a sealed appointment or authority was necessary only where the tortious act was 'extraordinary' though it is not made clear whether this word relates to the ordinary business of the company as a whole or merely to the ordinary function of the agent in question. But Taunton J. thought that 'the distinction is between matters which do, and matters which do not *affect any interest* of the corporation' (*ibid.* 530 (emphasis supplied). In these circumstances the *ratio* is no wider than that a corporation can be liable for a wrongful distress committed by its servants in the ordinary course of business though the servant be appointed only by parol.

[63] In *Maud v. Monmouthshire Canal Co.* (1842) 4 M. & Gr. 452, a canal company was held liable for its servant's trespass to the plaintiff's barges and coal; in *Eastern Countries Ry Co. v. Broom* (1851) 6 Ex. 314, a statutory railway company was held liable for an assault of a passenger by its stationmaster. In both cases the servants were appointed by parol.

[64] *Cf. R. v. Birmingham & Gloucester Ry Co.* (1841) 10 L.J. M.C. 136 and *R. v. Great North of England Ry Co.* (1846) 9 Q.B. 315 (corporation indictable for misfeasance as well as non-feasance) and more recently *D.P.P. v. Kent & Sussex Contractors Ltd* [1944] 1 K.B. 146; [1944] 1 A11 E.R. 119.

the benefit of the employer and vicarious liability generally, after *Eastern Counties Ry Co. v. Broom*[65] it was never again doubted that corporate delictual liability might exist although the corporation's servant had been appointed by parol.[66] There was every reason of commercial expediency why the same kind of development should occur in respect of corporate contractual liability. The developments in the areas of contract and tort each supported the other. Indeed the basis often argued for corporate vicarious liability, that the corporation had received the benefit of the tort, was analogous to the 'acceptance of the benefit of an executed contract' already noted. But in the area of tort, rather than a corporate acceptance of benefit *subsequent* to the act in question, the courts would often be content to note that the actor's *contemporaneous* or *antecedent* intention was to benefit his principal.[67] The emphasis in tort cases was thus on the quality of the act rather than on the principal's or employer's reaction to it.[68]

CONCLUSION

This article has been concerned with the common law exceptions to and the breakdown of the negative corporate seal rule. Only the exceptions considered in Section A were true exceptions whilst the bases of liability examined in Sections B and C are also applicable to natural persons and

[65] (1851) 6 Ex. 314.

[66] *E.g.* the point was not even raised in *Limpus v. London Omnibus Co.* (1862) 32 L.J. Exch. 34 or *Bayley v. Manchester etc. Ry Co.* (1872) L.R. 7 C.P. 415.

[67] Of course acceptance of the benefit of a tortious act after its commission would *a fortiori* make the corporation liable; *cf. Smith v. Birmingham Gas Co.*

[68] The development in the field of tort is strictly outside the scope of this article but certain matters may be noted. In *Turberville v. Stampe* (1698) 1 Ld Raym. 264, where fire from the defendant's close had escaped on to the plaintiff's land, it was noted that in relation to the defendant's employee who kindled the fire, ' . . . it shall be intended, that the servant had authority from his master, it being for his master's benefit.' (*ibid.* 265). In 1799, in *Bush v. Steinman* (1799) 1 Bos. & Pul. 404, the court went so far as to hold a householder liable for the negligent work of his independent contractor for no other reason than that the contractor had been working for his benefit. (This decision was questioned in *Quarman v. Burnett* (1840) 6 M. & W. 499 and overruled in *Reedie v. London & North West Ry Co.* (1849) 4 Ex. 244.) If a servant acted tortiously for his own benefit rather than his master's, albeit in what would seem to outsiders to be the ordinary course of his employment, it was once thought that the master was not liable. In other words, if the servant was not acting for his master's benefit, it would not be said that he was acting 'for' his master. (*Cf.* Willes J. in *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259; *Houldsworth v. City of Glasgow Bank* (1880) 5 App. Cas. 317 (H.L.); *British Mutual Banking Co. v. The Charnwood Forest Ry Co.* (1887) 18 Q.B.D. 714.) The leading decisions thought to support that proposition (*Barwick and Houldsworth*) were authoritatively explained in *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716 (though earlier in *Trott v. National Discount Co.* (1900) 17 T.L.R. 37 Kennedy J. had held an employer company liable for fraudulent misappropriation by an employee), and the principle that a master may be be answerable to third parties for his servant's act committed fraudulently for the servant's benefit has since been often applied against employer companies; *e.g.* in *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 K.B. 248 (C.A.); *Moore v. I. Bresler Ltd* [1944] 2 All E.R. 515; *United Africa Co. Ltd v. Saka Owoade* [1955] A.C. 130 (P.C.). Of course, the fact that a servant was at the relevant time acting for his own 'purposes' rather than his master's may be a factor to be considered in determining whether he has ceased acting 'in the course of his employment, *Croft v. Allison* (1821) 4 B. & Ald. 590; *Seymour v. Greenwood* (1861) 30 L.J. Ex. 189 & 327.

to bodies corporate which are permitted to contract in the same modes as a natural person; *e.g.* to the modern registered company.

It may be thought that if exceptions to the rule of formalism were to be allowed, it would be strictly insisted that the appropriate constitutional organ had acted in total compliance with prerequisites and with manner and form requirements. After all the outsider might have insisted on a sealing initially. But this approach was not taken. Perhaps the realities of commercial life compelled the courts to acknowledge that the outsider who did not insist on external form would hardly be likely to insist on internal form.

But how much less than total compliance would be effective was never defined. The question, 'In the absence of the seal, what is required?' scarcely troubled judicial minds. Perhaps it was the desire to accommodate the realities of business transactions which led to the haphazard and *ad hoc* creation of exceptions to the negative rule. Exceptions were allowed on a distinctly pragmatic basis and it is doubtful that any lawyer could have advised confidently in advance, whether a particular contract would be considered an exception and who (other than the appropriate constitutional organ regularly functioning) should make it for the corporation. Yet whilst only those treated in Section A were true exceptions, all classes of exception demanded that some human action or inaction or state of mind be attributed to the body corporate. It is remarkable that no body of principle emerged to govern such matters.